

No. 15102

United States
Court of Appeals
for the Ninth Circuit

THE CANADA LIFE ASSURANCE COM-
PANY, a Corporation, Appellant,

vs.

CHARLOTTE S. HOUSTON, Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 361 to 700, inclusive)

Appeal from the United States District Court for the Northern
District of California, Southern Division

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(Testimony of Charlotte H. Clayton.)

Q. Now, will you state for the record what those levels were, as near as you can recall?

A. This, from there to ceiling is approximately six feet eleven—

Q. Now, just a minute, so we get some marks. Well, you take this and do the marking instead of me. Now show the part that is six feet eleven. Will you draw a line across [312] the map where the six foot eleven—you might just circle the six foot eleven. A. (Witness designating.)

Q. Now will you put a green line around the outer boundaries, like around where the six foot level is? A. (Witness designating.)

Mr. Angell: I will mark that C-2.

Q. Now, the green outline on the map, Plaintiff's Exhibit 1, for the purpose of the record, shows that portion of the basement that was approximately how high? How high did you say?

A. From floor to ceiling?

Q. Yes.

A. Approximately six feet eleven.

Q. All right. Now, where would the next level be?

A. The next level is in this corner of the room.

Q. And you are pointing to the northwest portion of Plaintiff's Exhibit 1, is that right?

A. Yes.

Q. How high was that?

A. Approximately five foot eleven from floor to ceiling.

(Testimony of Charlotte H. Clayton.)

Q. Will you put that in red—outline the portion there that was five foot eleven.

A. (Witness designating.)

Q. Mark that C-3. [313]

A. (Witness designating.)

Q. Was there another level in the basement?

A. This is a higher level.

Q. You are pointing now to the northeast portion of the basement? A. That is correct.

Q. And that was how high?

A. Four feet eleven, approximately.

Q. Use that orange colored crayon and mark that portion which you say is about three and a half—

A. Four feet eleven (witness designating.)

Q. Referring to that portion of the basement which you said was six feet eleven, will you just generally describe what was in that portion of the basement?

A. This portion of the basement I used as a laundry; the washing machine I had here, water heater, tables for laundry, then the ironer, and then all around this edge were stored boxes, sewing machine here, two tables here.

Q. On Plaintiff's Exhibit 1 there are shown objects, sewing machine, boxes, garden tools and tables, paper boxes, and so on, stored on top, cabinet, ironer, table, table, water heater, and washing machine on this Exhibit 1.

Is that the way the objects shown on there were the afternoon of February 22nd when Mr. Houston

(Testimony of Charlotte H. Clayton.)

met his death? A. Approximately, yes. [314]

Q. And it shows the ironer in about the center of that six foot eleven space, is that correct?

A. Yes.

Q. That is on this Plaintiff's Exhibit 1?

A. Yes.

Q. Now, sometime subsequent or on or about March 24th, Mr. Bradford and Dr. Kirk came to the premises there, did they not, to make an inspection, an examination of these premises?

A. They did.

Mr. Clausen: Object to that as leading and suggestive.

Mr. Angell: It is just preliminary. We will show they did and I believe you know they did.

Q. And at the time that Dr. Kirk and Mr. Bradford were there, were the objects in the basement and that portion of the basement as shown by Plaintiff's Exhibit 1 in the same position they were on the afternoon on February 22nd at the time Mr. Houston met his death? A. They were.

Q. Referring to that portion of the basement shown on Plaintiff's Exhibit 1 as the northwest part and which you have shown as five feet eleven by your marking C-3, will you state what that portion of the basement was used for on February 22nd, 1954?

A. These two portions of the basement [315] were almost solid with storage, with stores of things.

Q. You are pointing now to the——

(Testimony of Charlotte H. Clayton.)

A. This area and this area (indicating).

Q. The area marked C-3 on there and C——

A. C-4.

Q. ——C-4 on Plaintiff's Exhibit 1, is that correct? A. That's correct.

Q. And was that the way that portion of the basement had been for some time prior to Mr. Houston's death? A. Yes.

Q. And that's the way it continued until after Dr. Kirk and Mr. Bradford's visit?

A. That is true.

Q. Will you just describe for the record what you had stored in that—take, first, the part there you have marked C-3 and state what was stored in there.

A. This is a sofa, and stored in front of the sofa were my patio chairs, with hand chairs along in here——

Q. Just a moment; so that the record will show that, there is marked on this exhibit the word "Sofa" in the area marked C-3. Is that where the Sofa was then? A. Yes.

Q. On February 22nd. Then in front of that sofa you say that you had your patio chairs?

A. Yes. My outdoor furniture. [316]

Q. All right.

A. The sofa was also piled with bamboo blinds and various and sundry things, on top of the sofa.

This is a cedar chest, a very large cedar chest, over which were thrown sleeping bags, air mattresses, and so forth.

(Testimony of Charlotte H. Clayton.)

Q. Now, that's the word "Chest." You might save time if you will say that where the word "Chest" appears in C-3 area the following articles were there—. It will save me correcting the record—correcting it for the record here—that is, if that won't confuse you.

A. Where it says "Bedding, etc.," were stored three or four beds, springs, mattresses, bedsteads, bed, both ends, with head and foot, mattresses and bedboards.

Q. Did those bedboards project out into the area shown on Plaintiff's Exhibit 1 in what would be the open area here in the area marked C-3?

A. They extended across here.

Mr. Angell: And the witness has pointed that they extended across from where the word "Chest" appears in this C-3 area.

A. Yes. This is a permanent bookcase, built-in bookcase.

Q. Pointing to what has previously been marked P-3, and which on this exhibit says "Bookcase."

A. That's correct.

Q. Is that correct? [317] A. Yes.

Q. In the extreme northwest corner there appears, on Plaintiff's Exhibit 1, the word "Broom and sweep."

A. There is a sweeper back there.

Q. What else?

A. And a broom—I think.

Q. Now, did Mr. Houston keep any of his sporting gear or equipment in that area?

(Testimony of Charlotte H. Clayton.)

A. He kept all of it in that area.

Q. And referring to that particular corner where it says "Brooms and sweeper," what in the way of sporting equipment did Mr. Houston keep in there?

A. He kept his guns in this corner.

Q. Pardon me—I have stopped you——

A. You want to know the rest of it?

Q. Answer the question. A. All right.

Q. He kept his guns in that part which is called on Plaintiff's Exhibit 1 "Brooms and sweeper," is that correct? A. Yes.

Q. Now, how long had Mr. Houston kept his guns in there?

A. He always kept them there.

Q. And was that for some time prior to his death on February 22nd?

A. I think as long as we lived there, which is two years. [318]

Q. And up to the date that he was killed in that basement, is that right? A. Yes.

Q. And how were the guns stored in there?

A. Standing up.

Q. They were standing on end?

A. Yes. (Designating.)

Q. And were they in any case? A. No.

Q. The butt rested on the floor and the barrel rested on the side of the wall? A. True.

Q. And were those guns by themselves in that area or were they scattered in among the other things that were there, such as the brooms and

(Testimony of Charlotte H. Clayton.)

the sweeper, which are shown on Plaintiff's Exhibit 1? A. That's correct.

Q. They were in among the other material, is that right? A. That's true.

Q. In other words, Mr. Houston had no gun case? A. No, sir.

Q. In any place in the house, is that correct?

A. That is true.

Q. Now, did Mr. Houston store any other of his sporting gear in the basement as shown by Plaintiff's Exhibit 1? [319] A. Yes, he did.

Q. Will you just state what and where and will you call it by the numbers that you have given, as either C-3 or C-4, whatever it is?

A. His saddles were hanging along here.

Q. You are pointing along here to a long——

A. Along—this platform is raised a foot.

Q. In other words, C-4 is a raised platform?

A. It is a raised platform.

Q. Were they stored on the C-4 area?

A. They were hanging from a rafter that goes through here.

Q. And that you show as along the western side of the C-4 area, is that correct?

A. That's correct.

Q. And how many saddles did Mr. Houston have? A. Three.

Q. Three? A. Yes.

Q. Did he have any other equipment, fishing equipment or sporting equipment, in that area?

A. He had all of his equipment in this area; he

(Testimony of Charlotte H. Clayton.)

had fishing poles, there were fishing boots also hanging from this rafter that the saddles hung from.

Q. Sleeping bags?

A. Saddle blankets, saddle bags, saddle bags, sleeping bags [320] —saddle blankets is what I am trying to say. Sleeping bags, air mattresses.

Q. And they were stored——

A. Hunting clothes, jackets, boots, riding boots.

Q. Now, Mrs. Clayton, I will show you a photograph which has the legend on it: "General view of area of shooting," and——

Mr. Clausen: May I ask counsel when it was taken?

Mr. Angell: If you will give me a chance, I will identify the photograph, Mr. Clausen.

Q. ——and ask you if that picture, that view, is familiar to you. A. Yes.

Mr. Clausen: Just a moment. We object to that on the ground the witness is looking at the photograph, and the critical question that I would like to know is when the photograph was taken. I ask counsel.

Mr. Angell: This is preliminary.

Mr. Clausen: No foundation is laid.

Mr. Angell: I can't be establishing everything all in one question.

The Court: You will have to lay the foundation.

Mr. Angell: I am trying to identify it.

The Court: You will have to lay the foundation for it.

(Testimony of Charlotte H. Clayton.)

Mr. Angell: I am going to lay the foundation.

The Court: You better do that at this time.

Mr. Angell: I am identifying it, your Honor.

Q. Have you seen that picture before?

A. I have.

Q. When was that taken, do you know?

A. I think Mr. Bradford took it.

Mr. Clausen: Well, now, just a moment—the witness says that somebody else took it. She didn't even answer the question. The question was when the photograph was taken. Evidently the witness doesn't know. I asked counsel the question, but he hasn't told me. So therefore, your Honor, I object on the ground that there is no foundation.

Mr. Angell: Well, I can't lay it with just one question, Mr. Clausen.

Q. Does that photograph in your hand show the articles that were in that corner the date of Mr. Houston's death?

Mr. Clausen: Same objection. Your Honor, the ground that the witness is being asked about, a photograph, there is no foundation laid as to who took the photograph or when the photograph was taken.

Mr. Angell: Your Honor——

Mr. Clausen: And counsel knows merely asking the witness to guess as to whether the photograph might show the conditions as of the date of the incident—. I think it is only fair that the party who took the photograph and the date be [322] made known to the court.

(Testimony of Charlotte H. Clayton.)

Mr. Angell: If your Honor please, the rule stated by Mr. Clausen has so long since been abandoned that it is surprising to hear it even mentioned in court any longer. The cases state you can show a witness a photograph to illustrate their testimony; if they have the knowledge, they can show that photograph shows what I saw on a given day, and they do not have to have taken the photograph, they do not have to have been present when the photograph was taken, nor need that photograph even have been made on that date or at any other particular date if the witness identifies the articles in that photograph and as correctly showing a situation as is depicted in that picture. In other words, it is just exactly as Mr. Clausen introduced this manikin yesterday, purely by way of illustration of what his witness had taken out of the coroner's testimony or the inquest testimony.

The Court: What serious objection is there to laying the foundation for this picture?

Mr. Clausen: (To counsel:) He is asking you a question.

Mr. Angell: Well, only that the witness didn't take the picture.

The Court: Well, who did?

Mr. Angell: A Mr. Bradford took the picture, and he will be here as a witness. [323]

The Court: With that understanding, I will allow it. If it is not connected up, it will go out.

Mr. Clausen: Yes, your Honor.

The Court: Let the record note the objection.

(Testimony of Charlotte H. Clayton.)

Mr. Angell: We will offer it for identification, then, only, your Honor.

The Court: Very well.

Mr. Angell: I will put it in for identification.

The Court: Let it be admitted and marked.

Mr. Angell: That will be Plaintiff's Exhibit 7 for identification.

The Court: It will be admitted and marked.

The Clerk: Plaintiff's Exhibit 7 marked for identification.

(Photograph "General view of area of shooting" marked for identification Plaintiff's Exhibit No. 7.)

Mr. Angell: Q. Now, I show you Plaintiff's Exhibit No. 7 for identification, Mrs. Clayton. Do you recognize the objects shown in that picture?

A. Yes, sir.

Q. And will you just state what that picture shows?

A. It is a picture of this area C-3 showing the bookcase, the bedding, what is marked here as "Bedding", the chest, the end of the sofa, and the patio furniture along here, sleeping bags. [324]

Q. Is that the way that area appeared on the date of Mr. Houston's death, on February 22, 1954?

A. Yes.

Mr. Clausen: Just a moment. Your Honor, we will object to that as calling for the conclusion of the witness, showing the witness a picture and asking whether that appeared that way to the witness as of a certain day.

(Testimony of Charlotte H. Clayton.)

The Court: Do you wish a ruling?

Mr. Angell: All I am asking is what the witness sees in that picture is what she saw on February 22nd.

The Court: I will allow it. Objection overruled.

A. I answered "Yes."

Mr. Angell: Q. Now Mrs. Clayton, do you know the distance between the outer edge of the bookcase and the space in Plaintiff's Exhibit 1 where it is shown as a passageway, a clear area in there, which is the access area in Plaintiff's Exhibit 1 back to where it says "Brooms and sweeper," do you know approximately how wide that passageway was on February 22nd, 1954?

A. Approximately eighteen inches.

Q. Did Mr. Houston frequently go into the basement? A. Very.

Q. Was it unusual for Mr. Houston to get up in the morning and go down into the basement?

A. Not at all unusual. He kept all of his [325] sporting equipment down there.

Q. And sometimes when you called Mr. Houston to meals or breakfast or dinner, did he go down into the basement after you had called him?

A. Very often.

Q. And would you ever go down there and find out what he was doing down there?

A. Sometimes. If I insisted he come to meals promptly.

Q. And would you go down to see what he was doing? A. Yes.

(Testimony of Charlotte H. Clayton.)

Q. And what would you find him doing down there?

A. Oiling boots or saddles or cleaning guns, fixing fishing equipment, tackle.

Q. On holidays and weekends when Mr. Houston was home, was it his habit to spend a great deal of time down there in the basement?

A. It was.

Q. With his sporting equipment?

A. That is true.

Q. And working on it?

A. Working on it.

Q. On February 22, 1954, there were found in the storage room, which storage room is marked "Storage Room" on Plaintiff's Exhibit 1, there were found two guns in that area, as shown by the testimony here. Did Mr. Houston as a matter [326] of practice keep guns in that area?

A. Not as a matter of practice.

Q. And had you ever seen any guns in that storeroom prior to the date February 22, 1954?

A. No, sir.

Q. What was that area used for primarily?

A. That is a storage area. My married daughter, I always called her, her closet—her wedding presents were stored in it. My daughter Ann has done a lot of art work and she kept her art material in there.

Q. That door, does it have a lock and key?

A. It has a lock and key.

(Testimony of Charlotte H. Clayton.)

Q. What would you say the size of that was, do you happen to know?

A. I don't know. But I should say four and a half, five feet square.

Q. Approximately four and a half, five feet square. Prior to the date and time of Mr. Houston's death did you go into that basement frequently?

A. Very frequently. It was my laundry.

Q. Your laundry. You would go in there several times a week, is that right? A. Yes, sir.

Q. And just prior to the time of Mr. Houston's death, when you went in there on any occasions did you see Mr. [327] Houston's guns or any of his guns back in the storage? A. Yes, sir.

Q. The storage place, which is marked C-3 and where it says "Brooms and sweeper" on Plaintiff's Exhibit 1? A. Yes, sir.

Q. Now, referring to Defendant's Exhibit C and the application for the insurance policy which is here the subject of this suit, there appears on that exhibit in the lower left-hand corner as a witness to the application filed with The Canada Life Assurance Company the name Robert C. Utley. Do you know Robert C. Utley?

A. Yes; I have know him for a long time.

Q. And who is Robert C. Utley?

A. He is the son of Harry Utley who is my husband's very close friend in Lakeview.

Q. And business associate?

A. Business associate and friend.

(Testimony of Charlotte H. Clayton.)

Q. And is Mr. Harry Utley the father of Mr. Robert C. Utley?

A. He is the father of Robert C. Utley.

Q. He is also the father of Mrs. Wilkerson, is that right?

A. That's true.

Q. And did Mr. Houston know Robert Utley?

A. Yes, he did.

Q. And how long had he know him?

Mr. Clausen: Just a moment. We will [328] object to that on the ground it is asking this witness what another person may know, certainly calling for speculation, your Honor.

The Court: If she knows she may answer. Objection overruled.

A. I knew him also.

Mr. Angell: Q. Yes.

A. My husband knew him. We saw him frequently when we went up at our camp near Lakeview.

Q. What period of time would that be?

A. We owned the camp for five years prior to Mr. Houston's death. And he had known Mr. Bob Utley—as a matter of fact, when Bob Utley was in the army Mrs. Bob Utley worked for my husband's company as a secretary or a stenographer.

Q. Do you know Mr. Robert Utley's occupation or business at the time that he witnessed this application for this policy?

A. He sold life insurance.

Q. And for what company?

A. The Canada Life.

(Testimony of Charlotte H. Clayton.)

Q. Do you know whether or not Mr. Houston took this policy out through Mr. Utley?

A. I know that he did.

Q. You know that he did? A. Yes.

Q. And Mr. Utley signed the application as a witness, your Honor, on the date that it bears, which is September 18, 1953. [329]

Did Mr. Robert Utley go hunting with Mr. Houston? A. I imagine he did, yes.

Q. Do you know whether he did or not?

A. I never saw him go hunting, no.

Q. Were Mr. Houston and you in the home of Mr. Harry Utley when Mr. Robert Utley was there? A. Frequently.

Q. Did you go to social events together?

A. We went to Harry Utley's, to dinner, with him.

Q. And can you think of any other social events that you went with Mr. Robert Utley, who was present, and Mr. Houston?

A. No, I can't. He has been at our cabin, at our camp.

Q. And how often has he been there?

A. I imagine that in the three or four weeks that I was there every summer I saw him three or four or five times.

Q. He would be present at social gatherings at your cabin at those times? A. That is true.

Q. Referring to Mr. Houston's health, do you know the condition of Mr. Houston's health at the time of his death or just prior thereto?

A. He was in very good health.

(Testimony of Charlotte H. Clayton.)

Q. Did he have any affliction which required him—or for which he did carry pills or——

A. He had a chronic sinusitis. [330]

Q. Did he take some pills or medicine for it?

A. He did.

Q. He carried those with him?

A. He also took vitamin pills.

Q. He took vitamins? A. That is true.

Q. How tall was Mr. Houston?

A. Six two and a half.

Q. And what weight at the time of his death?

A. 168, I imagine; maybe more. I am not sure.

Q. At any time prior to Mr. Houston's death had he ever complained to you of being ill or in bad health? A. No.

Q. Had he had any illnesses of a serious nature at any time, say immediately within the last two or three years prior to his death?

Mr. Clausen: Well, I object to that as being compound; there are two questions there in one.

Mr. Angell: I will withdraw it.

Mr. Clausen: All right.

Mr. Angell: Q. Had Mr. Houston had any serious illnesses within a year just prior to his death?

A. No.

Mr. Clausen: Object to that, if the court please, on the ground that it is asking this witness to speculate on what [331] another man may have had, not what another man stated but what another man may have had; unknown to this witness he may have had serious ills of which he may have said nothing.

(Testimony of Charlotte H. Clayton.)

The Court: The objection will be overruled. I will allow the question and answer to stand.

Mr. Angell: Q. What was your answer to that? I didn't hear it.

A. He did not have any serious illnesses.

Q. He had the usual run of colds, did he not?

A. Yes, colds.

Q. Flu? A. He had flu.

Q. Did Mr. Houston ever make any statement to you regarding his financial condition, as to whether it was good, bad or indifferent?

A. We discussed our financial condition rather often, I think, and I think that it was in—that it was a very good financial condition. We had nothing to worry about, is what I mean.

Q. Well, did Mr. Houston at any time ever say to you he was worried about his finances?

A. No, sir.

Mr. Angell: We have had prepared a financial statement by a certified public accountant showing Mr. Houston's financial condition at the date of his death. This I will [332] show to counsel and see if he will have any objection to its use. I will bring in the certified public accountant.

Mr. Clausen: I certainly do object to this and object to it on account of being irrelevant to the issues here so far as the tender of this evidence is concerned and no showing that Mr. Houston ever knew of this financial condition or that this reflex condition that Mr. Houston thought he had. There is no foundation for any of that.

(Testimony of Charlotte H. Clayton.)

Mr. Angell: Are you objecting to it on the ground that the man that made it is not here or are you objecting to it on the ground that it is inadmissible evidence?

Mr. Clausen: It is both, both inadmissible and—both inadmissible and no proper foundation.

Mr. Angell: Well, then, your Honor, I will ask at this time to mark this as Plaintiff's exhibit next in order for identification and then ask to be allowed to ask this witness questions concerning it, which are within her knowledge, and I will then produce the certified public accountant to identify the statement as having been prepared by him.

The Court: I will allow it.

(Financial statement marked for identification Plaintiff's Exhibit No. 8.)

Mr. Angell: I might say, your Honor, this exhibit as shown by the certification of the certified public accountant is prepared from public documents which are the inventories [133] of assets in the state proceedings of Mr. Houston, so they are a matter of public record.

Q. I will show you Plaintiff's Exhibit 8 for identification, Mrs. Clayton, and I will ask you to look that over carefully, and the assets there shown, and ask you if to the best of your knowledge that sets forth accurately the assets and liabilities of Mr. Houston and yourself on the date of Mr. Houston's death.

Mr. Clausen: I would object, your Honor, on the ground that there is no showing that this witness

(Testimony of Charlotte H. Clayton.)

knows—now, this is the first time I have seen this. What has apparently been done here, your Honor, is an attempt to estimate an asset and liability situation as of the date of death. For example, here are items which an accountant has picked out and set down, such as “Cash surrender values” and “Real estate,” and here’s a figure which is supposed to represent maybe market value, it may be sales value, who knows what.

Mr. Angell: I am going to produce the man who made it.

The Court: With the assurance that he produce the accountant, why, I will allow it.

Mr. Angell: You can examine him all you want as to where he got the figures.

Mr. Clausen: I might point further, your Honor, I think it is going far afield; I mean, I think it is too far afield from the immediate issue in the case.

Mr. Angell: The immediate issue is whether this man committed suicide or whether the death was by accident, and I think that everything that was in the mind of the man at the time of his death is pertinent to show his mental state as to whether he would have had any reason for committing an act of self-destruction.

The Court: For that limited purpose I will allow it.

Mr. Angell: I might say that in the case as put in by counsel it was tried in every way to show that this man was worried and in a depressive state.

Mr. Clausen: I understood the court ruled and I

(Testimony of Charlotte H. Clayton.)

have ceased talking, but I could answer counsel—I am not going to, your Honor.

The Court: Well, the jury is absent.

Mr. Angell: Q. Does the exhibit, Plaintiff's 8 for identification, which you hold in your hand, Mrs. Clayton, set forth the assets and liabilities as near as you can understand them to be?

A. Yes, sir.

Q. You have seen this accounting before, have you not? A. Yes, I have.

Q. You did file your accounting in Mr. Houston's estate?

A. Yes, I was his executrix.

Mr. Angell: For the record, solely, here, I wish to state that the record shows the current assets as of February [335] 22, 1954, to be \$133,336.70, and that the total liabilities were \$33,606.14, with a net worth of \$99,730.56.

Q. I am not sure that I have asked you this question and you answered it, so I am going to state it again—ask the question again: Will you state, as nearly as you can to—tell us what was Mr. Houston's nature. Was he ordinarily a happy sort of person or a gloomy, melancholy person?

A. He was a happy person.

Q. Would you characterize Mr. Houston as an extrovert? A. I would.

Q. Vigorous? A. Very, very.

Q. Dynamic? A. I would.

Q. And did Mr. Houston, as far as you observed, always enjoy the things that he was doing?

(Testimony of Charlotte H. Clayton.)

A. He loved life, he really did.

Q. Was he a sportsman? A. He was.

Q. And did he have any activities and sports other than in hunting and fishing?

A. In sports?

Q. Yes. A. Is folk dancing a sport?

Q. Well, some people might put it in the category of sports. [336] I was thinking of riding.

A. Oh, yes.

Q. Did Mr. Houston have any horses at the time of his death?

A. He owned four horses, yes.

Q. And where were those kept?

A. They were kept out in Martinez.

Q. And did he frequently go out there on weekends and ride?

A. Very often, went both Saturday and Sunday to ride.

Q. Would you and your daughters go with him?

A. Yes.

Q. Frequently? A. Frequently.

Q. Did Mr. Houston do any hunting other than just up in southern Oregon?

A. He had hunted in Colorado.

Q. Beg your pardon?

A. He had hunted in Colorado.

Q. And Mr. Houston was reared in Colorado, was he? A. He was reared in Colorado.

Q. And was he reared in the city or on a ranch?

A. He was reared in Steamboat Springs, Colorado, which is——

(Testimony of Charlotte H. Clayton.)

Q. What part of the country——

A. Mountain.

Q. Is that cattle country? [337]

A. Sheep.

Q. And Mr. Houston's boyhood, do you know whether he was around cattle and worked on cattle ranches?

A. Yes, he did, summers.

Q. Was Mr. Houston an accomplished man with a lasso?

A. Very.

Q. And in the handling of cattle and livestock?

A. Yes.

Q. Did he evidence or state any interest in those to you?

A. Yes. He was going to raise livestock on his ranches in Oregon.

Q. At the time of Mr. Houston's death did Mr. Houston make any statements to you about any activities he had to further his financial or business interests with respect to cattle or farming?

A. Yes, he was buying—he planned to buy cattle; I think he bought some, to put on his ranches in Oregon.

Q. Did he have any meeting set up that you know of at the time of his death for any day in that coming week with his business associates?

A. He did have. He met on Sunday with Mr. Wilks and Mr. Taylor, his partners, to plan ahead what they would tell their manager, their ranch manager, when he came down to town on Wednesday, what their plans would be.

(Testimony of Charlotte H. Clayton.)

Q. And the ranch manager was coming down that Wednesday [338] following that Monday?

A. He was.

Q. Following that Monday on which Mr. Houston met his death, is that correct? A. True.

Q. Referring to Mr. Houston's business activities, do you know whether or not Mr. Houston had been offered the presidency of any insurance company just some time shortly prior to his death?

A. He had been.

Q. You knew that from what source?

A. He told me.

Q. Do you know what company it was?

A. The Fire Association of Philadelphia.

Q. Did he make any statement to you as to whether he intended to take it and leave New Zealand or whether he didn't?

A. He told me that he would never want to go back to the east coast, that he planned to spend the rest of his time in the insurance business with the New Zealand on this—Pacific Coast.

Q. Did you and Mr. Houston have a fairly active social life? A. Yes, quite, I think.

Q. Did you give cocktail parties at your home?

A. No, we didn't give cocktail parties. We entertained guests at dinner. When we entertained it was that way. [339]

Q. Did you and Mr. Houston habitually attend cocktail parties?

A. I don't suppose we went to one a year.

Q. Did you belong to any neighborhood organi-

(Testimony of Charlotte H. Clayton.)

zations where they engaged in any sort of activity?

A. We belonged to a dancing club, square dancing, folk dancing, which met once a month at Hillside in Berkeley.

Q. Were you both quite active in that?

A. Yes, we enjoyed it tremendously.

Q. Right up to the time of Mr. Houston's death?

A. Yes.

Q. And where were those dances held?

A. At Hillside Club in Berkeley.

Q. Was there any drinking at those occasions?

A. No, sir.

Q. Now, Mrs. Clayton, referring to Mr. Houston's use and consumption of alcoholic beverages. Did Mr. Houston take a drink?

A. Yes, he did.

Q. Did you observe his drinking in your home or when you were out with him? A. I did.

Q. Would you just tell the court, in your own language, just what you observed with regard to Mr. Houston's drinking, and keeping it entirely within your own knowledge when he was [340] with you?

A. Mr. Houston and I sometimes had a drink before dinner, sometimes sherry or beer, maybe a highball. Often when we went out where we were entertained we didn't drink at all. We very seldom went to cocktail parties. I never in my life saw my husband intoxicated, unable to drive, unable to talk or to conduct himself as a gentleman—not once.

Q. How long were you married to Mr. Houston?

(Testimony of Charlotte H. Clayton.)

A. I was married to Mr. Houston twenty-five and a half years.

Q. At any time in those twenty-five and a half years did you ever have occasion to criticize or complain to Mr. Houston of his conduct, within the home or elsewhere, because of his drinking?

A. No, sir.

Q. And did you ever see Mr. Houston ever drink by himself? A. Never.

Q. Now referring, first, to your entire life with Mr. Houston as a wife, did you ever at any time during your entire life as a wife of Mr. Houston ever hear him state that he intended to or would take his life by his own hand? A. Never.

Q. Now, that period just before Mr. Houston's death on February 22, 1954, did Mr. Houston make any statement to you of any kind, that he intended to take his life? [341]

A. Absolutely not.

Q. Did he state anything to you as any reason which might cause him to take his life?

A. No, sir.

Q. Now, much has been said here as to his worrying about a report which he got out for his company each year, and referring to that report, did Mr. Houston discuss that report with you at all?

A. Oh, yes, he did.

Q. The report that he put in just before his death on February 22, 1954? A. He did.

Q. And what did he say about it?

A. He told me that it had to go back to the

(Testimony of Charlotte H. Clayton.)

printer's and that this extra page had to be put into it, and I think it all had to be re-signed.

Q. Did he appear to be depressed about that?

A. Not depressed; kind of mad, preoccupied and bothered.

Q. Did he state his reason why—was it because of a mistake made or that it had to be reprinted?

A. There was a deadline that had to be met, I think that was the trouble.

Q. And it had to go back to the printer to have a page done, is that right?

A. That's right. [342]

Q. In the days—let's take—or some period just prior to February 22, 1954, had Mr. Houston appeared any different around the home or any time you saw him than he had—than he did always?

A. No, sir.

Q. Did he seem any more depressed or morbid?

A. No, sir.

Q. Or melancholy? A. No.

Q. Did he seem happy and cheerful?

A. Yes.

Q. Now, the night before you were at the Hanscoms', as you have testified. Did he appear to be just as happy as usual and join in the conversation?

A. Yes.

Mr. Clausen: Your Honor, we have gone into this; it is repetitious. Object on the ground it's all asked and answered, many of these questions, this morning.

Mr. Angell: I think she has answered it.

(Testimony of Charlotte H. Clayton.)

Q. Now, are you familiar with the habits of Mr. Houston with respect to whether he kept his guns loaded around the house or did not keep them loaded? A. He kept them loaded.

Q. And did you see them or did he tell you they were loaded?

A. He told me they were loaded. [343]

Q. And what did he tell you about them being loaded?

A. He told me he always kept them loaded.

Q. Did he ever give you any admonition?

A. Oh, he told me to stay away from them, but he knew that I would.

Q. Did you of your own knowledge know when the guns that were in that space, shown on Plaintiff's Exhibit 1 as "Brooms and sweeper," do you know when the guns were in there, when they were brought to that place?

A. They were brought back with all of Mr. Houston's equipment from camp at the end of hunting season, approximately the first of November.

Q. As I recall your testimony, on the afternoon of February 22nd Mr. Houston came down from upstairs, he was in his bathrobe and slippers and he went through the kitchen and down the basement stairs and into the basement, is that correct, the lower portion of the house?

A. That is true.

Q. Was the door from the kitchen down the stairway to the basement open or closed?

A. It was open.

(Testimony of Charlotte H. Clayton.)

Q. When Mr. Houston went down that morning?

A. That door is always open.

Q. And just at the foot of those stairs, as shown on Plaintiff's Exhibit 1, is the furnace room, is that correct? [344]

A. That is true.

Q. And then, as shown on Plaintiff's Exhibit 1, to go into that storage room where the two other guns were found, you go through the furnace room and into that storage room, is that correct?

A. That is true.

Q. Is there anything about that door in that storage room which would have—you would have heard it open if it had opened?

A. It's a metal fire door.

Q. Yes.

A. It's heavy and it bangs and it has to be unlocked.

Q. It has to be unlocked?

A. There is no knob on it. It has to be unlocked in order for you to open it.

Q. Does it make any noise when it is pushed open? A. Yes.

Q. And it did on the morning of February 22nd, 1954?

Mr. Clausen: Object to that as leading and suggestive. This is his own witness.

The Court: Objection sustained. It may go out.

Mr. Angell: Q. Did you go in through that door frequently?

(Testimony of Charlotte H. Clayton.)

A. Not as frequently as I did the rest of the basement, no. [345]

Q. Did you from time to time go into it?

A. From time to time I went into it, yes.

Q. On those occasions, when you went in and out, did the door make any noise when it was opened and closed?

A. Yes, it does make a noise.

Q. On the morning of—or the afternoon of February 22, 1954, at the time Mr. Houston went through the kitchen down into the basement did you hear any noise of that door?

A. No, sir.

Q. Now, you went up to Oregon with Mr. Houston on numerous occasions, did you not?

A. Yes, sir.

Q. How long had you been up there?

A. Oh, four or five years.

Q. Where would you stay when you went up?

A. At our camp.

Q. And when you went up what would be the length of time you would stay—just generally?

A. Oh, three or four weeks.

Q. And it would be during the summer vacation? A. Yes.

Q. And would your daughters be with you?

A. My daughters and their friends, and the last time we went we had four young boys with us.

Q. And you all stayed at your cabin there?

A. Yes, sir.

Q. Did Mr. Houston—when he was up there did he usually dress differently than he did when he

(Testimony of Charlotte H. Clayton.)

was in the city or in his office? A. Yes, he did.

Q. What would he dress in?

A. Blue jeans, shirt, cowboy hat, cowboy boots.

Q. On those occasions did you observe any difference—any different demeanor on the part of Mr. Houston than when he was here?

A. Well, he was having lots of fun, jolly. He wasn't sitting behind a desk. He was having a vacation.

Q. And did you notice any difference as to the number of drinks he would take? A. No, sir.

Q. Or the times when he would take them?

A. No, sir.

Q. And did Mr. Houston go up there alone on many occasions, that you know of?

A. He almost always took somebody with him. I think he always did. I don't remember——

Q. When you were up there did you drive about the country? A. Yes, we did.

Q. Go out fishing, hunting?

A. That's right. [347]

Q. Did Mr. Houston do the driving, usually?

A. He always drove.

Q. After Mr. Houston's death did you discover or find any communication of any kind whatsoever?

A. No, sir.

Q. No notes? A. No, sir.

Q. No letters? A. No, sir.

Q. No nothing? A. No, sir.

Q. And there is one other question, referring to Plaintiff's Exhibit 1, on the morning or afternoon of February 22nd, at the time of Mr. Houston's

(Testimony of Charlotte H. Clayton.)

death, were there any clothes hanging in the basement?

A. That side of the basement was hung almost solid with clothes.

Q. And what were those clothes?

A. Laundry.

Q. Laundry? A. Laundry.

Q. In other words, you had been down there and washed and hung them there in the basement, is that right?

A. Yes. My daughter had been living on the campus for a week and she came home with a lot of dirty clothes. [348]

Mr. Angell: That is all.

The Court: Is that all from this witness?

Mr. Angell: That is all.

The Court: Take a recess.

(Short recess taken.)

Mr. Angell: May I ask one or two more questions about this map before you take Mrs. Clayton on cross? I wanted to ask about the lights in that basement.

Q. How many lights were in the basement?

A. There is one light.

Q. Will you take your green pencil and mark it and put C-5?

A. (Witness designating C-5.)

Q. Do you happen to know the candle power, the wattage of that light, what it was on February 22nd, at the time of Mr. Houston's death?

A. 100.

(Testimony of Charlotte H. Clayton.)

Q. 100 watts? A. Yes.

Q. Then there were windows in there?

A. These two windows.

Q. As shown on Plaintiff's Exhibit 1?

A. That's right.

Q. There is one other question. Are there any clotheslines in that basement?

A. Yes, there are clotheslines running (indicating). [349]

Q. Will you take the orange chalk and just draw a cross there, the clotheslines as they were on February 22nd?

A. There is a heavy rafter that runs through here. The clotheslines run across from this rafter to the rafter on the side.

Q. Just draw them in there. A. All right.

Q. Just put lines.

A. (Witness designating.)

Q. How many are there all told?

A. Eleven.

Q. On that day that Mr. Houston died there, those had clothes on them?

A. Yes, they did have.

Mr. Angell: All right.

Cross Examination

Mr. Clausen: Q. Mrs. Houston, you went down to the basement that morning after the shooting, you could see all right, couldn't you?

A. Yes, I could see.

Q. As a matter of fact, you testified this morn-

(Testimony of Charlotte H. Clayton.)

ing concerning objects that you saw, that you said that you saw then that you said were the same in the photograph, is that correct?

A. That's correct.

Q. I beg your pardon? [350]

A. That is true.

Q. In other words, you looked at a picture that counsel showed you of the Coroner in this particular area where the gun was found and you just told us this morning that those objects were in the same position on this afternoon of February 22nd, 1954, isn't that correct? A. Yes, sir.

Q. In other words, you could see that?

A. Yes.

Q. In addition to the light, your basement has windows that are indicated right here where I am pointing? A. That's true.

Q. Well, Mrs. Houston, you told us also this morning that you could not hear this door in which there were two other guns—there was a storage room where you said that two other guns were stored; do you recall that? A. That's right.

Q. You said you couldn't hear that door upstairs? A. I said I didn't hear it.

Q. No, as a matter of fact, you didn't even hear the shot that killed your husband, did you?

A. No, sir.

Q. I beg your pardon? A. I didn't.

Q. No. That was heard by your daughter and your mother? [351] A. That's true.

Q. Now, Mrs. Houston, you told us this morning

(Testimony of Charlotte H. Clayton.)

that Mr. Houston always kept his guns in this corner by the brooms and the sweeper, and later on you stated that he had two guns in a storage room. Would you mark, so there is no question about where that storage room is, Mrs. Houston—would you come to the board, please, and just put an “X”?

A. (Witness designating on map.) This is the storage room.

Q. I see. A. Here.

Q. Just put a mark there, with an “X”—put an “X” there where those guns were in that room.

A. (Witness designating.)

Q. All right. A. Shall I number it?

Q. Give it the next number, Mrs. Houston.

A. (Witness designating.)

Mr. Clausen: Thank you. It is marked C-7, for the record.

You may resume your seat.

Q. As a matter of fact, isn't it correct, Mrs. Houston, that you did not know where these guns were in the basement before the shooting?

A. Yes, I knew where they were kept.

Q. You didn't pay any attention to them, did you? [352]

A. Not to go and look at them, no, but I knew where they were.

Q. Well, isn't it correct they were kept anywhere in the basement, Mrs. Houston? A. No.

Q. Mrs. Clayton, rather?

A. Well, they were kept in that corner.

Q. Well, do you recall giving your deposition,

(Testimony of Charlotte H. Clayton.)

Mrs. Clayton, on May 31, 1955—and I am referring now to page 26, lines 13 to 17 (handing to witness).

Will you read that, please?

A. (Witness examining.) Yes, sir.

Q. On that occasion did you give this testimony——

Mr. Angell: Page number?

Mr. Clausen: 26, line 13 through 17:

“Q. Were they kept in any other place in the house?

“A. They were kept anywhere in the basement. I really don’t know. This one end of the basement I very seldom got into. The laundry was my end and an open space at the other end of the basement.”

Did you give that testimony? A. I did.

Q. And is it not a fact, Mrs. Houston—Mrs. Clayton, rather——. Well, I will ask you to read the testimony on page 27, line 6 over to page 28, line 1, please (handing witness). [353]

A. (Witness examining.)

Q. Did you give testimony on the taking of the deposition:

“Mr. Cathcart: Q. As far as you know, the guns were never kept in any other part of the house?

“A. On occasions they were kept upstairs. I think not in the—in this present house, however.

“Q. You don’t recall of ever having seen the guns in this present house in any other place than in the basement, is that correct?

“A. I don’t remember.

(Testimony of Charlotte H. Clayton.)

“Q. When was it that you acquired this present house? “A. Two and a half years.

“Q. And I may be repeating myself but how many guns did you see down there—the last time that you noticed the guns at all?

“A. I honestly didn’t notice guns because they were completely out of my department.

“Q. When you say you didn’t notice them, you didn’t notice how many except that there was one or more?

“A. I wouldn’t know and I wouldn’t know what kind of guns.”

Did you give that testimony?

A. I did. [354]

Q. Now when you told us this morning also about the guns being loaded, that was just an assumption on your part, wasn’t that correct?

A. My husband told me they were loaded.

Q. Well now, were all these guns your husband’s guns? A. I think they were his guns.

Q. And isn’t it correct, though, on occasion that he kept other people’s guns there? A. Yes.

Q. And isn’t it correct that he didn’t tell you he kept the guns of other people loaded?

A. I don’t—I didn’t ask him that.

Q. Well, he didn’t ever tell you that he kept all guns loaded then, did he, Mrs. Houston?

A. Yes, he did tell me that.

Q. Including guns of other people?

A. Well, he didn’t go into that. He didn’t make that.

(Testimony of Charlotte H. Clayton.)

Q. That is what I say, he didn't say that he kept all guns of any kind that he ever had in the house loaded, did he? A. Yes.

Q. Including those of other people?

A. What he said was: "I always kept my guns loaded."

Q. All right, now, Mrs.—I will refer you to the—I will ask you the question: Do you know from anything he said to you whether he always kept guns loaded, even those guns that [355] didn't belong to him?

A. He never said: No, I don't keep those that don't belong to me loaded. He didn't say that.

Q. He didn't tell you that? A. No, sir.

Q. Now, in point of truth, Mrs. Clayton, you actually of your own knowledge don't know where the gun was that did the firing there on this occasion, do you?

A. I know that there were guns in that corner of the basement.

Q. That is what I understand you said, but I say, you actually of your own knowledge don't know, specifically of your own knowledge, where that gun was exactly before the firing, do you?

A. No.

Q. Now, Mrs. Clayton, you testified this morning concerning a financial statement. Counsel handed you this. You told us this was correct. Now I am referring, and I will hand you the sheet—I am going to ask you about——

The Court: Exhibit what?

(Testimony of Charlotte H. Clayton.)

Mr. Clausen: Exhibit 8, Plaintiff's 8.

Q. You listed down there as liabilities as of this date, February 22, 1954, last year, "Sundry amounts payable"—you told us these were correct—\$475. What accounts were they?

A. They were the bills that were owing at the time of my [356] husband's death.

Q. Now then, you have "Notes and accrued interest payable, current installments \$3,481.74." What were they?

A. They were notes on the two ranches and there was a note to my husband's father.

Q. Well, isn't that the note that is set down here underneath, "Unsecured — M. Elliott Houston, \$9879.82"? A. Yes.

Q. Well, I am asking you concerning the figure of \$3481.74.

A. I don't know unless it was those three notes.

Q. All right. Now then, you have an item here of \$1000, "Stock subscription payable T-Bone Ranches, Inc." Is that one of these corporations that you referred to? A. Yes, sir.

Q. Now then, you have an item, "Liabilities" under "Liabilities and net worth"—there is a liability, "Notes and mortgage loan payable: The Canadian Bank of Commerce \$9903.33." Do you know what that was? A. Yes, sir.

Q. And do you know the—you said he talked his financial affairs over with you—do you know when that loan was started, how far back it was he first borrowed on his life insurance?

(Testimony of Charlotte H. Clayton.)

A. Yes. I imagine it must have been eight or nine years ago, I can't give you the date. [357]

Q. In other words, about eight or nine years before 1954 he had first pledged his life insurance policies against loans, correct?

A. Yes, sir.

Q. And by successive loans, isn't that correct, throughout the years from that point down to the time he died, he owed at the time he died, on these—secured by these life insurance policies—this sum of \$9903, isn't that right?

A. Yes, sir.

Q. Do you recall how he was paying off this loan to the Canadian Bank of Commerce secured by these life insurance policies?

A. Yes, he was paying them off, paying it off.

Q. How was he doing that?

A. I can't tell you exactly.

Q. You don't know that?

A. No.

Q. Do you know that he first borrowed in 1945 some \$8000?

A. I think that was probably when we bought our first house in Berkeley.

Q. And do you recall that at that time he borrowed \$6000 from the Canadian Bank of Commerce and at that time assigned to the bank life insurance policies?

A. Yes, sir.

Q. Now, do you recall that in 1951 he had borrowed, after [358] paying off somewhat another loan, he borrowed \$3800 more?

A. Yes.

Q. Raising the amount he owed to the Canadian Bank of Commerce to \$8000—some odd dollars?

(Testimony of Charlotte H. Clayton.)

A. Yes, sir.

Q. Do you recall that in June of 1951 he borrowed \$2300 more, raising his balance to some \$10,000?

A. I don't remember these dates, really. I can't swear that I remember on a certain date he did this.

Q. Mrs. Clayton, when you said you discussed your financial affairs often with Mr. Houston, did he discuss with you his repeated borrowings from the Canadian Bank of Commerce?

A. Yes, I knew what he owed to the Canadian Bank of Commerce.

Q. Is it your recollection that in 1951 he made two loans, successive loans, one for \$3800, one for \$2300?

A. Yes.

Q. Is it your recollection that in the year 1952, the following year, he borrowed \$2500 more?

A. Yes, I know that. I didn't know the date of it. I couldn't tell you dates.

Q. Is it your recollection that in that same year, 1952, in July, he borrowed \$1250 more?

A. Yes.

Q. And is it your recollection that in 1953, after the loan [359] had been reduced down, that he borrowed an additional \$2000 again, raising the balance then to \$10,900, odd, on his life insurance policies?

A. I knew that.

Q. And therefore at the time of his death he owed this \$9900 and some odd dollars referred to in your Plaintiff's Exhibit 8?

A. Yes.

(Testimony of Charlotte H. Clayton.)

Q. And then in addition to that he owed on a loan for the purchase of the home in which you were living \$12,347? A. Yes, sir.

Q. In addition to that he owed relatives—rather, M. Elliott Houston, an unsecured loan of \$9879?

A. Yes, sir. Oh, these current installments are the notes and accrued interest payable.

Q. Beg your pardon?

A. Current installments \$3481.74. That's the same figure as the notes and accrued interest payable that you asked me about.

Q. This \$3481 would be a current liability, isn't that right? That's what it is designated by the accountant. A. Yes, sir.

Q. Isn't that correct? A. Yes, sir.

Q. In other words, at the time he died he then at that [360] moment had a current liability—in other words, a then current liability, according to this, of \$3481. Is that right? A. Yes.

Q. Now, my question, before your recollection is refreshed, is what were they, do you know?

A. Aren't they this?

Q. Well, I am asking you, Mrs. Clayton. Can you tell me what those installments, current installments were at the time he passed away?

A. Do you mean how much they amounted to?

Q. To the various people, yes, ma'am.

A. I didn't pay his bills, so I don't know.

Q. You don't know that? A. No.

Q. Mrs. Clayton, isn't it a fact that during the

(Testimony of Charlotte H. Clayton.)

week or some weeks before Mr. Houston's death he was suffering from some back pain?

A. Yes, he had a stiff back.

Q. And isn't it a fact, in connection with the financial affairs that I have just been asking you about, Mrs. Clayton, that you folks, you folks spent about the amount of money that he made?

A. Yes, we lived very well.

Q. That you did, despite the fact that he made some \$20,000 [361] a year, isn't that correct?

A. True.

Q. Let me ask you this, Mrs. Clayton. Your present name is Clayton? A. That's true.

Q. And when did you remarry, please?

A. July 9, 1955.

Q. And to whom?

A. James O. Clayton.

Q. What is his occupation?

A. He is a research chemist with California Research Corporation, a subsidiary of Standard Oil.

Q. And had Mr. Houston known him?

A. Yes, sir.

Q. And you had been friends with your present husband during the lifetime of Mr. Houston?

A. Yes.

Q. For how long?

A. They were almost the first people we knew when we moved to Berkeley.

Q. How long was that?

A. About ten or eleven years.

(Testimony of Charlotte H. Clayton.)

Q. All right. Now, you and Mr. Houston had, I believe you stated, two children.

A. That's true. [362]

Q. Two daughters? A. That's right.

Q. Did Mr. Houston have any children by any former marriage? A. No, sir.

Q. And what is your occupation at the present time?

A. Until I was married I was a real estate salesman.

Q. Real estate salesman, is that correct?

A. That's true.

Q. And in connection with your activities as a real estate salesman, were you experienced in life insurance matters? A. No, sir.

Q. When was it exactly, Mrs. Clayton, that you first employed these investigators—reference has been made this morning to two investigators, a Dr. Kirk and a Mr. Bradford—when was it that you first employed them?

A. Prior to the time of the inquest.

Q. And just about how long before the inquest?

A. I can't tell you the exact date.

Q. I beg your pardon?

A. I don't know the exact date.

Q. Well, in reference to the date of death, how long after the death was it?

A. Three or four weeks.

Q. And when was it that you—let me ask you this, on the [363] date of the death, do you recall the police came there? A. Yes, sir.

(Testimony of Charlotte H. Clayton.)

Q. And you recall you spoke with the police officers? A. Yes.

Q. And when was it in reference to that that you employed counsel, that you employed any attorneys?

A. Within three or four days after my husband's death.

Q. And can you tell me exactly with reference to the date of death when it was, for example, that you discussed with Mr. Angell the situation?

A. Oh, not more than a week, I think, after my husband's death.

Q. A week after? A. Yes.

Q. Is that correct?

A. I can't say exactly.

Q. Well, what is the nearest that you can fix it accurately?

A. I would say a week or ten days, I am not positive.

Q. And when was it that you—. Did you speak with Mr. Allison? A. Yes.

Q. And when was that in reference to the date of death?

A. At this time I talked to Mr. Angell, Mr. Allison and Miss Tommy Angell.

Q. At the same time? [364]

A. At the same time.

Q. Did you speak with any other attorneys before that?

A. I talked to my friend, Mr. Hanscom, yes.

Q. When was that?

(Testimony of Charlotte H. Clayton.)

A. That was immediately after my husband's death.

Q. And how soon after?

A. Oh, within a day or so.

Q. And about the following day or day after?

A. Yes, sir.

Q. And are those the only attorneys you spoke with? A. Yes.

Q. Now, did you employ any other investigators or speak with any other investigators than Dr. Kirk and Mr. Bradford? A. No, sir.

Q. Do you recall when the police—do you recall when the police arrived that you spoke with the police officers who were on the stand here, that was a Mr. Pine and Inspector Parker?

A. Yes, sir.

Q. How soon after you went downstairs and saw your husband did you speak with these officers? A. As soon as they got there.

Q. Well, in point of time, Mrs. Clayton—what amount of time elapsed?

A. Oh, it couldn't have been more than half an hour. [365]

Q. And at that time, you told us yesterday, you had last seen your husband alive when he was, I believe you said it was in the hall.

A. He was coming in from the hall.

Q. All right. A. To the kitchen.

Q. What period of time elapsed between the time you saw him in the hall and the time that you heard the thud?

(Testimony of Charlotte H. Clayton.)

A. Very little time. I don't suppose more than a minute and a half passed, but I can't say exactly.

Q. One minute and a half?

A. It was a short time.

Q. Is that what you estimate it to be?

A. That is what I estimate it to be.

Q. When the police arrived and you spoke there with these officers, did you tell the officers that you and your husband, Mr. Houston, then had had a heavy weekend?

A. Heavy weekend?

Q. Yes.

A. I don't know what you mean by "heavy".

Q. I beg your pardon?

A. I don't know what you mean by "heavy".

Q. Did you tell them anything about a weekend?

A. I don't remember. They may have asked me what I was doing the night before. I don't think that they did. [366]

Q. Did you tell them that your husband had a heavy week coming up?

A. Yes, I did.

Q. And by "a heavy week coming up", you meant what?

A. Busy.

Q. Beg your pardon?

A. Busy.

Q. Did you tell them that he had been working extra hard?

A. Yes, sir.

Q. And did you tell them that at about this approximate period of the year he was getting out his annual report?

A. Yes, sir.

Q. And did you tell them that this approximate period of the year he had periodic periods of depression?

(Testimony of Charlotte H. Clayton.)

A. I said, "depression", possibly. I don't know what I said at that point. But I didn't mean by "depression" what your Dr. Bennett meant yesterday, I assure you.

Mr. Clausen: I ask the last portion go out as a voluntary statement, Your Honor.

The Court: It may go out.

Mr. Clausen: Q. Did you tell them at that time that your husband had been, during these periods, nervous?

A. I think I—I don't know, as I said, I was—you can imagine how I felt—I can't say I said this and I didn't say that. I can only say that I did not mean by "depression" [367] what you felt I meant.

Mr. Clausen: Again ask that go out.

A. I meant preoccupied.

Mr. Clausen: Again, Your Honor, we ask the last portion go out as to what she meant.

The Court: The question and answer will stand.

Mr. Clausen: Q. Now, at the time that you talked with the police officers—. Well, let me put the question this way: You don't mean to testify—or I will ask you the question this way: Surely, Mrs. Houston, or Mrs. Clayton, during the married life of your husband and yourself, you and your husband did have arguments, did you not?

A. Yes, we did have arguments.

Q. Your husband, that morning of his death, did not say to you, did he, that he was going down to the basement? A. No, sir.

(Testimony of Charlotte H. Clayton.)

Q. He had not—he did not say to you that he was doing down to get any gun?

A. No, sir.

Q. He did not say to you that he was going down to get any ammunition? A. No, sir.

Q. He did not say to you that he had any hunting trips coming up? A. No. [368]

Q. And you were, in point of truth, expecting him to come down and eat breakfast, isn't that right? A. That's true.

Q. Did you know, Mrs. Clayton, that at this point of P-3, the bookcase, or at any other place ammunition was stored?

A. This ammunition was stored everywhere around.

Q. Beg your pardon?

A. Ammunition was stored in all sorts of places, in our house, our basement.

Q. All over the basement? A. Yes, sir.

Q. What other places in addition to P-3?

A. I have seen it in suitcases, dresser drawers.

Q. And suitcases upstairs or downstairs?

A. Downstairs.

Q. Any dresser drawers upstairs?

A. Yes, sir.

Q. And in what dresser drawers?

A. Mr. Houston's dresser drawers.

Q. Up in his bedroom? A. Yes, sir.

Q. And in what other places have you seen it in the basement, Mrs. Clayton?

(Testimony of Charlotte H. Clayton.)

A. He had come in from—. I can't say this, can I? May I explain? [369]

Q. Well, just tell me what other places in the basement you had seen ammunition.

A. I have seen it on tables. He would come in from a trip or going out to the horses and just dump everything; wherever it fell, it fell.

Q. How long had it been, Mrs. Clayton, since he had been on a trip where he had fired any guns, when the death occurred?

A. He had been duck hunting.

Q. Beg pardon?

A. He had been duck hunting in November.

Q. The prior November, is that right?

A. Yes. But they took guns out when they went out to the horses, for target shooting.

Q. When he went duck hunting he used a shotgun, did he not? A. I imagine so, yes.

Q. Did you see the bag of ammunition on this point of P.3 before the morning—or rather, before the day of the death? A. Yes.

Q. And you knew that was there?

A. Yes.

Q. And what kind of a bag was that?

A. A paper bag.

Q. Beg your pardon? A. Paper.

Q. Do you have the bag? [370]

A. No, sir.

Q. Does your attorney have it?

A. No, sir.

Mr. Clausen: Do you have that, Mr. Angell?

(Testimony of Charlotte H. Clayton.)

Mr. Angell: I haven't. You have never asked me. I do know where it is.

(Discussion between counsel.)

Mr. Clausen: Q. Well, the gun was taken, I understand, by the coroner, or the police, isn't that right? A. That's true.

Q. What kind of a paper bag was it that ammunition was kept in at this point of P-3 on the blackboard? A. It was a grocery sack.

Q. Just a grocery sack. You mean an ordinary paper bag? A. Yes, sir.

Q. And about how high a bag was it?

A. (Indicating).

Q. Indicating what?

A. About 14 inches.

Q. 14 inches. How wide a bag?

A. 8 or 9.

Q. 8 or 9 inches. And was that just an ordinary sack with an open end? A. Yes, sir.

Q. I beg your pardon? [371]

A. Yes, sir.

Q. Do you know what kind of ammunition was kept in there? A. No, sir.

Q. Do you know that—. Well, I will ask you this question: You testified this morning concerning your husband's habits. Your husband at all times, Mrs. Clayton, was careful with firearms, was he not? A. Yes, sir.

Q. During that morning, that is, the morning of this day, what time did you arrive yourself, Mrs. Clayton? A. 9:30, approximately.

(Testimony of Charlotte H. Clayton.)

Q. About 9:30. What did you do then, Mrs. Clayton?

A. My daughter and I had breakfast and sat in the patio in the sun.

Q. Then did you go out of the house?

A. No.

Q. I beg your pardon? A. No, sir.

Q. And then what did you do?

A. We decided to have lunch.

Q. And——

A. And I came in and I started lunch, and I went upstairs and asked my husband if he would like to come down.

Q. And then the police arrived. Could you tell me about the time that the police arrived at your home, Mrs. Clayton? [372] What time it was?

A. I couldn't tell you myself. I know what they testified. They said 2:15, I think.

Q. Does that coincide with your own recollection?

A. It does, although I was not aware of time at that point.

Mr. Clausen: Your Honor, may we take the recess now?

The Court: Very well.

(Whereupon a recess was taken until 2:00 p.m. this date.) [373]

Cross-Examination—(Continued)

Mr. Clausen: Q. You were asked, Mrs. Clayton, by your counsel concerning the electric light

(Testimony of Charlotte H. Clayton.)

in the basement. I am not sure whether this is in the record or not.

When you went down right after the shooting, that electric light was lit, was it not?

A. No, it wasn't.

Q. I beg your pardon? A. It was not.

Q. Had you been down there earlier that morning?

A. I think I had been hanging up some laundry, yes.

Q. Well, didn't you testify yesterday that you had gone down to do some laundry?

A. Perhaps I did.

Q. Well, now, are you able to recollect whether you had or had not before you went down after the shooting? Rather, had you gone down on this day before? A. I had, yes.

Q. Now, when you went down, did you turn on the light?

A. I turned it on, probably.

Q. All right. This was in the morning, was it?

A. Yes, sir.

Q. In the afternoon the sun comes through those two windows [374] to the west, doesn't it?

A. Yes, sir.

Q. And this happened in the afternoon around about 2:00 o'clock? A. Yes, sir.

Q. All right. Would you say there was a good deal of sunlight there at the time that you went down after the shooting?

A. Yes, there was sunlight.

(Testimony of Charlotte H. Clayton.)

Q. There are two windows on that westerly side? A. That's right.

Q. And your house was a corner house, was it not? A. No, sir.

Q. The house was facing another house to the west, was it?

A. No. Those windows are on the back of the house, on the down slope?

Q. Yes?

A. And there are pine trees planted, like this, that come up as high as the second story windows.

Q. Yes. And you also testified that—. Well, I will ask you the question: There is no house directly behind those windows, is there?

A. No, sir.

Q. Now, you testified concerning having gone to church. Was that the day before? [375]

A. Sunday.

Q. The day before the accident?

A. Yes, sir.

Q. And—rather—withdraw that.

The day before the death of Mr. Houston?

A. That's right.

Q. Now, the church that you went to was what church?

A. First Congregational Church of Berkeley.

Q. First Congregational Church. Were you and your husband members of the First Congregational Church of Berkeley? A. Yes.

Q. Did your husband go with you on the Sunday before? A. He did.

(Testimony of Charlotte H. Clayton.)

Mr. Clausen: That is all.

Redirect Examination

Mr. Angell: Just one or two questions.

Q. I don't recall what you said with respect to the light being on in the basement at the time that you found Mr. Houston.

A. The light was off.

Q. The light was off when you came down to the basement? A. Yes.

Q. And you saw Mr. Houston lying on the floor, is that correct?

A. Yes, sir. [376]

Q. Now, your mother was there in the house, was she not, at the time?

A. Yes, she was.

Q. At the time of the death. And where is your mother now?

A. My mother is in Colorado.

Q. Is she ill? A. She is not well.

Q. She has Parkinson's disease?

A. Yes.

Q. Mr. Houston was in his bathrobe and slippers at the time of the shot, is that correct?

A. That's correct.

Q. Was that anything unusual, for Mr. Houston to go about the house, in the basement, in his bathroom and slippers?

A. It wasn't unusual for any of us to. We live in a very secluded spot; nobody can see into our patio, even. We all went around in bathrobes, sat in the patio in bathrobes, always.

(Testimony of Charlotte H. Clayton.)

Q. When Mr. Houston came down and started in the basement in his bathrobe and slippers, that was not anything different than he had done before?

Mr. Clausen: Object to that, Your Honor, as leading and suggestive.

Mr. Angell: I am asking whether it was anything different than he had done before. [377]

The Court: You may answer.

A. It was not.

Mr. Angell: I think that is all.

The Court: Step down.

(Witness excused.)

Mr. Angell: Mrs. Hanscom.

ANN HOUSTON HANSCOM

called as a witness on behalf of the Plaintiff; sworn.

The Court: Your full name, please?

A. Ann Houston Hanscom.

The Court: Spell your last name for the reporter. A. H-a-n-s-c-o-m.

The Court: Where do you reside?

A. At Hunter's Point.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. You are the daughter of Mr. William Houston who was the insured in the policy sued upon here, Mrs. Hanscom? A. Yes.

Q. And you have a sister; is she older or younger than you?

(Testimony of Ann Houston Hanscom.)

A. Four years older.

Q. Her name is Charlotte? [378]

A. Yes.

Q. You are married, are you not?

A. I am.

Q. When were you married?

A. June 25, 1955.

Q. What does Mr. Hanscom, your husband, do?

A. He is in the Navy, an ensign.

Q. Prior to your marriage, where did you reside?

A. 1028 Miller Avenue, Berkeley.

Q. Were you residing with your family on the morning of February 22, 1954?

A. I had lived in my sorority house the week of rushing but I came home that Sunday night to spend the night because the next day—

Q. You were there over the weekend of Washington's Birthday weekend of 1954, is that right?

A. I was there Sunday only. I was at my sorority house Saturday.

Q. You were there Sunday, home Sunday?

A. Yes.

Q. And Monday? A. Yes.

Q. Tell us, before you went to the University of California and lived there, did you live there at home, in the family home? [379]

A. Yes.

Q. Describe your family relationship with respect to whether it was a close association or a distant one.

(Testimony of Ann Houston Hanscom.)

Mr. Clausen: I object to that, Your Honor, as calling for the conclusion of the witness. What may have been close to the young lady on the stand, to another person may not be. It would be calling for her own impression.

The Court: The objection will be overruled. She may answer.

A. Oh, well, I would say it was very close. Yes, we did lots of things together.

Mr. Angell: Q. Did you go to social events together? A. Yes.

Q. You went riding together on weekends?

A. Yes.

Q. Went fishing, hunting together?

A. Not hunting.

Q. You didn't hunt? A. No.

Q. Would you go up to Southern Oregon, to Lakeview, with your father? A. Yes.

Q. And had that been the custom for years?

A. As long as we had the cabin in Oregon, it had been the custom. [380]

Q. You were in the home on the morning—on the day of February 22, 1954, were you?

A. Yes.

Q. And the night before, had you been out to any social function?

A. Yes. We went to the Hanscoms for dinner and I don't remember what time Ron and I left for dinner, then to a movie, because the next day was a holiday.

(Testimony of Ann Houston Hanscom.)

Q. You heard your mother testify, did you not, as to who was present at that party?

A. Yes.

Q. Is that your testimony? Would it be the same? A. Yes.

Q. Was there any drinking at that party or dinner?

A. I think we all had one or two.

Q. Was that before or after dinner?

A. Before.

Q. You just had one or two?

A. We always do over at the Hanscoms. I believe so.

Q. Were they cocktails?

A. Yes, I believe so, yes.

Q. Did you observe your father's conduct and behavior on that night? A. Yes.

Q. On February 21? [381] A. Yes.

Q. Will you just tell the Court in your own words how you observed his demeanor and actions?

A. He acted perfectly normal.

The Court: You will have to raise your voice so the reporter can hear you.

Mr. Angell: Will you speak up? The reporter has to get the answer and these gentlemen out here have to hear it—if you can, Mrs. Hanscom.

A. Well, it is just like any other dinner we had before at the Hanscoms.

Mr. Angell: Q. Did you notice any difference in your father's actions or in his speech?

A. No, I didn't.

(Testimony of Ann Houston Hanscom.)

Q. Was it different than at any other time?

A. No.

Q. Did your father act depressed or morbid or melancholic at all? A. No.

Mr. Clausen: Object to that as calling for the conclusion of the witness.

The Court: Objection overruled.

Mr. Angell: Q. Did he join in the conversation and take part in the discussion with other people there? A. Yes, he did. [382]

Q. What time did you leave there, if you can recall?

A. I am not sure. In order to see an entire movie, it must have been about, oh, 8:30 or 9:00, I imagine.

Q. You came back and stayed home all the night of Sunday, is that right? A. Yes.

Q. And you were there in the morning?

A. Right.

Q. Now, on Sunday morning did you get up early? A. Yes.

Q. What time, about?

A. About 9:00 or 9:30.

Q. And just state then the events that occurred there at the home on that day, up until you found your father's body in the basement.

A. Well, it was unusual for mother and me to get up that early on a holiday but we—I had some washing to be done—so mother did the washing, and, well, we had breakfast first. And we ate breakfast in the patio and stayed out in the sun. And

(Testimony of Ann Houston Hanscom.)

then we got hungry for lunch and mother started getting lunch ready. And she went up and asked Daddy if he would like to come down to lunch. And he said, "yes."

Mr. Clausen: Now, just a moment. Your Honor, that's the vice of the voluntary—I mean vice of the broad question. There is no showing that this—that the witness was present [383] and heard the conversation between her mother and father. We object to the statement, Your Honor, and ask it go out.

Mr. Angell: Q. Did you hear what your mother said to your father? A. No.

Mr. Clausen: We ask therefore that that testimony go out.

Mr. Angell: It may go out.

Q. Just confining to what you heard and saw yourself and not what you heard from somebody telling you. A. All right.

Q. You started to get lunch?

A. Yes. And I wanted to hang a shelf in the hall outside of the kitchen, and I got out my hammer and nails and was putting that up and had put it up and I was putting the hammer and nails away when Daddy came downstairs into the kitchen, and I was singing, "Oh, what a Beautiful Morning", and he came up to me and gave me a good morning peck on the forehead, and said it certainly was a beautiful morning.

And I told him we were going to have steak for breakfast. And he said that sounded wonderful.

(Testimony of Ann Houston Hanscom.)

And then——

Q. How was he dressed at that time?

A. Bathrobe, slippers and pajamas.

Q. Did he have any gun in his hand? [384]

A. No.

Q. Did he have any different look in his face than he did at any time? A. No.

Q. Did he display any erratic look?

A. No.

Q. Did he look happy, was he smiling?

A. Yes, he was.

Q. And then where did he go from there, do you know?

A. I don't know. I went into the living room to speak to my grandmother.

Q. And then what next occurred, that you were familiar with the happenings?

A. Then I heard a bam!—and I came back into the hall because I thought my shelf had fallen, and I called to mother and I didn't get an answer. Then the next thing I knew, she called me and said, "And, as quickly as possible, call the ambulance."

Then I ran downstairs into the basement and saw Daddy.

Q. What time do you say it was—how much time had elapsed from the time you spoke to your father there in the hall and he gave you a peck, how much time would you say it was to the time you heard what you described as a bam or wham?

A. Just enough time for me to walk from the door of the kitchen into the living room. [385]

(Testimony of Ann Houston Hanscom.)

Q. Could you estimate it in minutes or——

A. A minute.

Q. That would be——

A. To about a minute and half.

Q. Two minutes, maybe? A. Uh-huh.

Q. Now, would you step to the blackboard here, Mrs. Hanscom, and take a look at this exhibit, Plaintiff's Exhibit 1, and would you look at these marks that are marked—I believe that's—I can't make out that one.

Mr. Adams: C-1, it should be.

Mr. Angell: Q. C-1, I think it is. Isn't it?

A. This?

Q. Yes, this. Can you read that?

A. No, I can't.

Q. It looks like a C-1. It's the X right next to the washing machine shown on this exhibit.

And I ask you if your father's body was lying near there or how you would place your father's body when you first saw it.

A. I would say right there (indicating).

Q. You would place it about the same place, that X, and will you just give it a new mark so that we can identify it for the record. Will you call that H-1? A. Right here? [386]

Q. Yes.

A. (Witness designating H-1 on Exhibit 1.)

Q. Will you take a pointer here and will you just quickly describe the condition of this basement at the time that you were there over that weekend of the 22nd, just generally, quickly?

(Testimony of Ann Houston Hanscom.)

A. You mean including the things that are——

Q. I think you go right ahead and describe the whole area in there, quickly.

A. There are lines of laundry hanging on the lines—with laundry on the lines against—coming from the west wall—and tables to the right as you come in the door from the stairs down to the basement, newspapers and boxes, newspapers and so on; and then washing machine—beg your pardon—I meant to the left, the tables are to the left, and the washing machine is to the right. Another table and the ironer, and the whole basement is on three levels. The ironer and laundry on the level that you come to as you enter the door.

Q. That has been designated by your mother as the area known as C-6 outlined in green. Now, that is one level. A. Yes.

Q. Now, looking at the area outlined in red, which is labelled C-3——

A. That's another level.

Q. About what level would you say that is?

A. You mean how much higher than the other level?

Q. Well, how high is it from the floor to the ceiling?

A. Five eleven, approximately.

Q. And then the other level is as shown on here, C-4, is that correct? A. Yes.

Q. Now referring to these levels as you describe the contents, just so they get in the record and we will know what we are talking about, are the ob-

(Testimony of Ann Houston Hanscom.)

jects which are shown on this exhibit, Plaintiff's 1, which you have stated were in the area designated C-6 here, were those objects in about the same position as shown on this map on February 22, 1954? A. Yes.

Q. Is that true of the objects that are shown on the map in the area shown as C-3?

A. Yes.

Q. And now nothing is shown on the map in the area of the map C-4. Will you state just briefly what was in that area, if anything?

A. How do I explain? At the place where the step-up was to the high level, Daddy hung all his saddles and his fishing boots and there were, oh, suitcases full of belts and socks and things he used on his hunting trips, and some old boxes up on this highest level, and golf clubs and tennis rackets, I believe. [388]

Q. Tennis rackets? A. Uh-huh.

Q. Did your father play tennis?

A. I believe he used to, years ago.

Q. Now, did you ever see any guns in that area at all?

A. Yes, in this area (witness indicating P-3).

Q. You are pointing at what area?

A. P-3.

Q. On Plaintiff's Exhibit 1.

A. Is that right, P-3?

Q. P-3 refers to a bookcase in the area shown here is C-3. Now, will you——

A. Well, they were in the corner.

(Testimony of Ann Houston Hanscom.)

Q. Well, there are words on this Plaintiff's Exhibit 1, "brooms and sweeper"; would they have been in that corner? A. Yes.

Q. Now, did you see guns at any time any place else in the basement—at any time?

A. Yes.

Q. Where did you see any guns at any time?

A. There were some lying on this section, yes, right here (indicating).

Q. That is, when they were there—you had seen some there—you mean at some time or other?

A. Yes. [389]

Mr. Clausen: Indicating——

Mr. Angell: She is indicating——

Mr. Clausen: ——the northeast corner of the section rimmed in green.

Mr. Angell: Let's get at it this way.

Q. Did your father, so far as you observed, and you know of your own knowledge, keep his guns or was in the habit of keeping them this one place (indicating)?

A. Yes, in this place (indicating).

Q. He kept them usually up where it says—what is that legend up there in Plaintiff's Exhibit 1?

A. "Brooms and sweeper."

Q. Now, did he keep them elsewhere, at any time? Had you noticed guns around elsewhere at different times?

A. He used to keep a pistol in his closet shelf.

(Testimony of Ann Houston Hanscom.)

Q. Did you ever see any rifles or shotguns up in his closet? A. Yes.

Q. Had you ever seen them in other places in the basement?

A. Not that I can remember.

Q. Did you on that morning of February 22, when you went down in there, observe any guns at all? A. No, I didn't.

Q. You didn't see any guns? A. No.

Q. On that particular morning? [390]

A. No, I didn't.

Q. Did you not see the gun which your father was shot with? A. No.

Q. You didn't go back in that corner, is that right? A. I did not.

Q. You can put that down and resume the stand.

Had you ever at any time in your life heard your father make any statement that he intended or was going to commit suicide? A. Never.

Q. Did you observe your father's demeanor that weekend when you were home, as to whether he seemed to be his natural self, or did you see anything different about him than the usual way he looked or talked?

A. No, I didn't.

Q. Did he appear to be happy and about the same as he always was, at that time?

A. Yes.

Q. There was nothing that led you to be suspicious? A. No.

(Testimony of Ann Houston Hanscom.)

Q. Do you know anything about your father's illnesses, was your father a man who was ill very much? A. No.

Q. Do you recall him ever having any serious illness of any kind? [391]

A. No, I can't.

Q. Did you ever hear your father state that he was troubled or worried, disturbed in any way about his finances? A. No.

Q. Now referring to your father's use of alcoholic beverages. Had you ever seen your father take a drink? A. Yes.

Q. Will you just state in your own words to the Court about how you would describe your father's drinking, from time to time, say——

Mr. Clausen: Your Honor, we object to that as asking this witness to speculate. In other words, he is asking the witness to put an interpretation upon a habit, which is purely a conclusion or opinion of this witness.

Mr. Angell: I ask her to state what she saw.

Mr. Clausen: You asked her——

The Court: She may state what she saw, if anything.

A. He would take one or two or sometimes no drinks at all.

Mr. Angell: Q. And was there any time that you can recall when your father was not drinking anything? A. Yes.

Q. When was that period, do you know?

A. I would say a year before his death.

(Testimony of Ann Houston Hanscom.)

Q. Did he ever tell you why he wasn't at that time?

A. He was on a fat-free diet, I believe. [392]

Q. Trying to take off weight?

A. Yes.

Q. Did you ever, in all the years you lived with your father, all the trips you took with him, ever see your father intoxicated?

A. Never in my life.

Q. Did you ever see your father drink so much alcohol or where he had had so much alcohol that he was unable to drive his automobile?

A. Never.

Q. Or staggered? A. Never.

Q. Or walked with uncertainty?

A. Never.

Q. Did you ever see your father when he had so much alcohol that he was not coherent in his speech? A. No.

Q. And wholly rational in his speech? Did you ever see him in that condition? A. No.

Q. When such times as you were home and when you were living home, did the family have any custom as to whether they got up early or slept late around the holidays, the weekend?

A. We always slept late, when we could.

Q. You had always slept late? [393]

A. Yes, we always did.

Q. I think I have asked this question of you, and that is, was it your father's custom or habit

(Testimony of Ann Houston Hanscom.)

to go about the house and the basement in his pajamas and bathrobe? A. Yes.

Q. There was nothing unusual about that?

A. No, nothing at all.

Q. Did you ever see shells around the house?

A. Yes, sir.

Q. Where did you see shells?

A. Anywhere, really, he kept them in his drawers and his—he kept them wrapped up in old socks.

Q. In other words, as far as you know, your father had no real shell place where he kept shells; he just kept them anywhere, is that right?

A. Anywhere.

Q. Did you notice whether your father had his glasses on at the time he went into the basement—at the time you went into the basement and found his body there?

A. No, I didn't notice at the time.

Q. Did you subsequently determine that he had not? A. Yes.

Q. How did you determine that?

Mr. Clausen: I object to that as what the witness didn't see and asking her to speculate what happened. [394]

Mr. Angell: I am asking—no.

Q. After you found your father's body, did you find his glasses? A. Yes.

Q. Where were they?

A. On his dresser in the bedroom.

Q. Did your father always wear glasses, whether he was working or reading or not?

(Testimony of Ann Houston Hanscom.)

A. Yes.

Q. As part of his dress, all the time?

A. Yes.

Q. Did you go up to Southern Oregon with your father on any trips?

A. Yes. The whole family did, when we all could.

Q. How many times would you go up there?

A. How do you mean?

Q. Over the past four or five years prior to your father's death.

A. Four or five times, I guess.

Q. I beg your pardon?

A. Four or five times. We went up every summer.

Q. What would you do up there?

A. We would swim and ride and hike, fish.

Q. Now, when you were up there with your father and saw him, did you notice that he had any different habits toward [395] drinking than he did down at home? A. No.

Q. Prior to the date of February 22, 1954, the time you found your father's body, had you seen guns back in that back part marked "Brooms and sweeper"? A. Yes.

Q. On Plaintiff's Exhibit 1? A. Yes.

Q. Did you ever know a Robert Utley?

A. Yes.

Q. Was he the son of Mr. Harry Utley?

A. Yes.

Q. Mr. Harry Utley was in business with your father? A. Yes.

(Testimony of Ann Houston Hanscom.)

Q. And you knew him, how long ago, do you believe?

A. I think I met him first when we went up to Oregon for the first time.

Q. And did he ever come out to your cabin?

A. Mr. Utley?

Q. Robert? A. Yes.

Q. And you went and saw him in his father's home, Mr. Harry Utley's home?

A. At their home and at their cabin—at Mr. Utley's home, Harry Utley's home. [396]

Q. And social events also when he was present?

A. Yes.

Q. Did you ever examine any of your father's guns when you saw them prior to the 22nd of February, 1954, to determine whether they were loaded or not? A. No, I didn't.

Q. Did your father ever say anything to you as to whether he kept his guns loaded or not?

A. He said he always kept his guns loaded.

Q. Now, what was the occasion that he told you that? How did he come to mention that to you, if there was any reason?

A. Why, I had known it all my life.

Q. Well now, he told you that at one time. What did he tell you about it?

A. He just said they were always kept loaded.

Q. Any other times when you were around the home there and your father was home, did you ever see him working down in the basement with any of his sports gear? A. Yes.

(Testimony of Ann Houston Hanscom.)

Q. In his bathrobe? A. Yes.

Q. And will you just tell us what you saw him doing at the time you went down?

A. Just puttering around in his—with his equipment, and polishing his—oiling his saddles and his leather goods and [397] he made leather belts and cleaned his guns.

Q. There has been much said here—you heard in the testimony—about a report that your father was getting out. Do you know anything about that report? A. Personally?

Q. Yes. I mean, that he was getting out such a report? A. No, I didn't know it.

Q. You didn't know it. Nothing was said about it? A. No.

Q. In other words, nothing was said in the home that weekend about that report that you heard, is that correct?

A. No; that's correct.

Mr. Angell: I think that is all.

Cross-Examination

Mr. Clausen: Q. Mrs. Hanscom, as I understand it, you had been away to school, is that right?

A. I went to school at the University of California in Berkeley and I had been staying for one week at my sorority house, during rushing.

Q. This was immediately before this Sunday that you testified that you came home for the night?

A. Sunday evening, yes.

Q. Yes. And, as I understand it, you were, Mrs.

(Testimony of Ann Houston Hanscom.)

Hanscom, upstairs in the house at the time of the shooting? A. No, I was not. [398]

Q. You were upstairs. By "upstairs" I mean——

A. Yes, I beg your pardon.

Q. You were certainly not in the basement area.

A. No.

Q. You were on the first floor area, upstairs from the basement? A. Yes.

Q. And did I understand you, Mrs. Hanscom, to say that your mother had gone down first following this noise? A. Yes.

Q. And that she called to you?

A. She did.

Q. When she called to you, where was she, downstairs? A. Yes.

Q. And at the time that she called to you, was the light lit downstairs, was the light lit in the basement? A. I don't recall.

Q. You can remember that? A. No.

Q. As a matter of fact, Mrs. Hanscom, you did not, when you went down, go into this area which is rimmed in red here in the northwest section of the house, is that correct?

A. That's correct, I did not.

Q. You did not even see the gun in question?

A. No, I didn't. [399]

Q. And therefore, when you—well,—. How long a period did you remain down in the basement after you went down, Mrs. Hanscom?

A. Oh, not very long before I ran upstairs to call.

(Testimony of Ann Houston Hanscom.)

Q. Then you went up and called the police?

A. I couldn't call.

Q. I beg your pardon? You did not call? Who did call the police?

A. My grandmother, Mrs. Spaulding.

Q. All right. Then did you go back downstairs again? A. Yes.

Q. And were you downstairs when the police arrived? A. Yes.

Q. And did you talk to the police with your mother? A. Yes.

Q. And did your grandmother also speak to the police? A. Not that I remember.

Q. Was she downstairs when the police arrived?

A. No, she was not.

Q. She remained upstairs? A. Yes.

Q. And when the police arrived how long a time were you downstairs, Mrs. Hanscom?

A. With the policeman?

Q. When the police were there, yes. [400]

A. Oh, I can't remember.

Q. Well, can you estimate it roughly, Mrs. Hanscom? After the police got there, when they were downstairs, you were there; how long were you there with the police, with them?

A. Oh, four or five minutes.

Q. Beg your pardon?

A. Four or five minutes.

Q. Four or five minutes. Now, what time elapsed between the time that your father passed you or spoke to you in the hall and when you heard the shot?

(Testimony of Ann Houston Hanscom.)

A. Oh, not very long, just, as I said, enough time to go from the door of the kitchen into the living room.

Q. That is for you to go from where you went into the living room, is that correct?

A. (Witness nods head.)

Q. Just say yes or no. The reporter can't see you nod your head, Mrs. Hanscom. The time that that would take roughly in your own mind, as you estimate it, would be how much?

A. A minute or a minute and a half or two.

Q. All right. Now, would you step to the black-board again, Mrs. Hanscom?

You indicated a portion which I at the time said was in the northeast corner. You indicated a portion in the northeast corner of what I said was an area rimmed in green as where you had seen guns before. [401]

Will you point to that, please?

A. In this area, right here?

Q. Yes.

A. I believe I saw along here (indicating).

Q. All right. Would you put marks where you believe you saw them? Put an X—X at the places where you believe you saw them.

A. (Witness designating.)

Q. All right. Now, I will mark that H-1—I don't believe there is an H——

Mr. Adams: Yes. H-2.

Mr. Angell: That's H-2.

(Testimony of Ann Houston Hanscom.)

Mr. Clausen: All right, H-2. (Counsel writing "H-2" on Exhibit 1.)

You may resume the stand, if you will.

Q. How many times, Mrs. Hanscom, did you see guns in that portion marked H-2?

A. Just once.

Q. And when was that?

A. Well, a pretty long time ago. I remember, because Ron, my husband, had mentioned that they were all loaded.

Q. There on that place of H-2?

A. Yes.

Q. Is that correct? A. Yes. [402]

Mr. Clausen: And may I have the gun there, please.

Mr. Angell: You nod your head, Mrs. Hanscom. The reporter can't get it.

The Witness: I beg your pardon.

Mr. Clausen: Q. From looking at this gun, would it be a gun that resembled this in appearance?

A. I don't know anything about guns.

Q. All right. You can't answer that, then. All right, Mrs. Hanscom. You stated—well, let me ask you this question: I notice on the diagram on the board the area reserved for servants.

Were there full-time servants in the house then?

A. No, we used that when my grandmother came to visit.

Q. Was that where your grandmother stayed?

A. Yes.

(Testimony of Ann Houston Hanscom.)

Q. In that area then on the basement floor?

A. Uh-huh.

Q. And was she staying there at the time?

A. Yes.

Q. Now, you stated that your father always wore glasses. Isn't that correct?

A. I did.

Q. So when he came down this day, on this particular Washington's Birthday with no glasses on, that itself was unusual, was it not, Mrs. Hanscom? [403]

A. He didn't put them on the minute he got out of bed.

Q. I beg your pardon?

A. He didn't put them on the second he got out of bed.

Q. In other words, it was not unusual for him to go about the house without glasses, is that right?

A. Well—he wore them most of the time, but he didn't pop them on his face the minute he got out of bed.

Q. I understand. So I am asking you whether it was usual for him then to come downstairs, for example, to breakfast, without wearing his glasses.

A. Would you repeat that?

Mr. Clausen: Would you read it back, Mr. Reporter?

(Question read.)

A. No.

Mr. Clausen: That is all.

(Testimony of Ann Houston Hanscom.)

Redirect Examination

Mr. Angell: Q. Mrs. Hanscom, would you step to the board, Plaintiff's Exhibit 1. Would you mark an H-3 to show the hall where you were putting up that little shelf?

Mr. Clausen: Well, as I understand this, counsel, is this not a diagram of the basement?

Mr. Angell: It is in the basement. I want to locate that hall in respect to the basement.

Mr. Clausen: Well, as I understood the witness' testimony, she was putting the shelf up on the upper floor. [404]

Mr. Angell: That's right. I want to show above what area in the basement.

Mr. Clausen: Above the basement area?

Mr. Angell: Yes.

A. It would be right here, but there is—it's right——

Mr. Angell: Q. You look at it good and get oriented before you put anything on it.

These are the stairs coming up to the kitchen. What room of your house was right directly over the servants' quarters?

A. The kitchen.

Q. That was the kitchen. A. Yes.

Q. Now, what would be directly above the furnace room? A. The hall.

Q. And what hall would that be?

A. Front hall.

Q. Was it in that hall where you were putting the shelf?

(Testimony of Ann Houston Hanscom.)

A. No, it was—. Well, there is a hall that goes from the front hall into the kitchen. It was that hall.

Q. In other words, you have a double hall there?

A. It is a little one with a powder room off it.

Q. It was in that hall that you were putting this shelf up when your father came down, is that correct? A. Yes. [405]

Q. And he passed through that in order to go through the kitchen in coming downstairs?

A. Yes.

Mr. Angell: That is all.

Mr. Clausen: No further questions.

(Witness excused.)

CHARLOTTE H. GUSTAFSON

called as a witness on behalf of the plaintiff; sworn.

The Court: Your name, please.

A. Charlotte Houston Gustafson.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. Now, you are the daughter of Mrs. Clayton who is here, and Mr. Houston, deceased, who was the assured under the policy sued on here, is that correct? A. I am.

Q. Mrs. Gustafson, where do you reside?

A. At 2921 Florence Street in Berkeley.

Q. And are you married? A. I am.

Q. What does your husband do?

A. My husband is the assistant production con-

(Testimony of Charlotte H. Gustafson.)

trol manager at United Centrifugal Pump Company in Oakland.

Q. And how long have you been married? [406]

A. Since March 24th, 1951.

Q. Now, prior to your marriage did you attend the University of California? A. I did.

Q. You are a graduate of that institution?

A. I am.

Q. Do you have any children?

A. I have one daughter.

Q. Up to the time you were getting married in '51 did you live home or did you live in the sorority house while you were in college?

A. I lived predominantly at home. I lived I believe out of the four years perhaps three weeks, maybe four in my sorority house.

Q. While you were living at the sorority house during that year would you go home frequently?

A. Oh, yes.

Q. And during your——

A. During weekends.

Q. And during your college years, why, when you were not at the sorority you would go home and stay, is that right? A. That is true.

Q. And after you finished the university did you return to home to live or did you get married before?

A. I was married the March before graduation in June. [407]

Q. Now, after your marriage did you always make your home there in Berkeley?

A. Yes.

(Testimony of Charlotte H. Gustafson.)

Q. Would you see your family frequently?

A. Yes, I would say frequently.

Q. During weekends from time to time?

A. Yes. Yes.

Q. Did you attend social functions with them?

A. Yes, both my husband and I did.

Q. And did you have vacations to southern Oregon also?

A. Yes, we both went to southern Oregon with my family.

Q. Will you describe your relationship with your father and your mother, the family relationship, just in short, brief words? Was it a close relationship?

A. It was a close relationship and a very happy one. We were both—I shouldn't say "both"—but there was mutual love and respect and admiration, I believe.

Mr. Clausen: Well, ask the answer go out, your Honor, as a conclusion of the witness, rather a long answer.

A. I'm sorry.

Mr. Clausen: The answer, your Honor, being the impression of the witness, obviously, of the marital life between father and mother, and it is not responsive to the question, either, in the sense that it is her own impression.

The Court: Well, she may give her impressions, may [408] she not? Objection overruled.

Mr. Angell: Did you hunt and fish with your father?

(Testimony of Charlotte H. Gustafson.)

A. I didn't like to hunt. I loved to fish.

Q. Did you like to fish?

A. Yes. And to ride.

Q. You rode horseback with your father?

A. Yes. Yes.

Q. You went up to southern Oregon and on trips with him?

A. Yes. Since I was a little girl we did that every summer.

Q. Was your father a good sportsman?

A. I considered him excellent.

Q. Could you rope a cow?

A. Yes, and me.

Q. And you? A. Yes.

Q. And your father had spent earlier years on a ranch, had he not?

A. Yes, as a boy. Yes, he told me he had.

Q. Were you at the dinner at the Hanscoms' the night before February 22, 1954?

A. No, neither my husband nor I were there.

Q. Neither of you were there. When prior to February 22, 1954, was the last time that you were in the basement of your father and mother's home on Miller Avenue where your [409] father was shot?

A. Well, it's kind of difficult to know for sure. I would have to sort of guess, because I did my washing and my ironing once a week, sometimes twice, at my mother's, in her basement, so it was either the week prior to daddy's accident or the

(Testimony of Charlotte H. Gustafson.)

week previous to that. You see; do you see what I mean?

Q. In other words, you can recall it was within two weeks of your father's death?

A. Oh, yes. Yes.

Q. And prior to that did you from time to time go up and into the basement?

A. Yes, because I had large cardboard cartons full of things that I never had room for in my own apartment once I was married, so I would go see them there.

Q. You had things—household things?

A. Household things, as well as——

Q. Stored in that basement, is that right?

A. That is true.

Q. And from time to time did you go into the basement? A. Yes.

Q. And where did you keep your things mostly in that basement, with respect to your wedding presents?

A. Always in the storage—the room marked “Storage.”

Q. On Plaintiff's Exhibit 1? [410]

A. Yes.

Q. Could you make an estimate of the size of this room marked “Storage”?

A. Well, it wasn't very big, because—well, I'm sure I couldn't have lain down on the floor—that is, within—. I would say maybe five feet by five or four and a half by four and a half.

Q. Did you have a large quantity of things stored in there?

(Testimony of Charlotte H. Gustafson.)

A. Oh, yes, shelves. There were shelves.

Q. That room was pretty well loaded, is that right?

A. Yes, shelves on two sides.

Q. Will you just quickly describe the nature of the area here shown in Plaintiff's Exhibit 1 as the basement area where the laundry was located and just tell us quickly what was kept in there, what was the place used for, as you observed?

A. Well, the first level where the clothes lines are indicated was the washing machine, the heater, the ironer and the clotheslines and the sewing machine, and mother kept cartons and newspapers, and things like that.

Q. Will you step down here to this exhibit, Plaintiff's Exhibit 1, and I direct your attention to the area marked "Brooms and sweeper" and the area within red marked C-3, and I ask you if you—ask you when was the last time you ever looked in there prior to February 22, 1954. [411]

A. Well, I always hung my sheets along here. The last time I washed, oh, those, I always hung—hung the sheets near the windows, and I faced this way, so undoubtedly the last time I washed my clothes, which was in the last two weeks before daddy's accident, I could see into that place.

Q. Do you know whether at that time you saw any gun or guns in there?

A. I can't swear I saw them that time, no, but I have seen them when I was there.

(Testimony of Charlotte H. Gustafson.)

Q. Had you ever seen guns in the area marked "Brooms and sweeper"? A. I have.

Q. And would there be one or more than one?

A. I would say more than one.

Q. Usually more than one?

(Witness nods head.)

Q. Do you know anything about guns?

A. I know a pistol from a rifle and so on—shotgun—but I have never shot a rifle or a shotgun. I have seen daddy loading and cleaning—but I have never shot one.

Q. Do you know anything about whether your father's custom or habit was to keep his guns loaded or unloaded?

A. It was his custom to keep them loaded.

Q. How do you know that?

A. Because he would show me that they were loaded or I [412] would check, if a pistol—I have checked a pistol to see if it is loaded.

Q. Do you know how to check?

A. I know daddy's kind of pistol.

Q. Did your father ever tell you his reason for keeping his guns loaded?

A. No. That's just the way he did things.

Q. Did you ever see shells anywhere around in the basement area, shown by Plaintiff's Exhibit 1?

A. I believe I saw shells on the bookcase.

Q. Have you seen them any place else?

A. The basement, you mean?

Q. Yes.

A. Golly, he had everywhere—this I think has

(Testimony of Charlotte H. Gustafson.)

been brought out before—he had his clothes and saddle equipment and hunting and fishing, all those things, everything there practically, everything; he would keep shells there as well as I had seen them in the dashboard in the car—you know, the glove compartment—and in his dresser drawer upstairs, and in socks and in sacks; it seems everywhere.

Q. Do you know what kind of shells they were or were they all kinds?

A. Some of them were pistol kind of shells and some of those large red cartridges with the brass on the end—I think that's for a shotgun—I am not sure. [413]

Q. Was this area designated C-3 on Plaintiff's Exhibit 1 loaded with merchandise or property of some kind?

A. You mean was it loaded with guns?

Q. Objects—— A. Yes.

Q. ——and things. A. Yes.

Q. Was it pretty well filled up?

A. Very well filled up.

Q. In the area marked C-4, was that area used for anything in particular?

A. Nothing but storage.

Q. What was stored in there?

A. To the best of my recollection just cartons and cartons of books, clothes, there was some furniture, badminton racquets, as well as tennis racquets, golf clubs, just piled high.

Q. Any fishing equipment?

A. Not in here.

(Testimony of Charlotte H. Gustafson.)

Q. Where was the fishing equipment?

A. Over in here.

Q. It used to be kept over here with the brooms and sweeper? A. That's correct.

Q. And how about saddles? [414]

A. Saddles were hanging here, along this way, and I have also seen daddy's hip boots hanging up as well.

Q. Now, referring to the area where it says "Bookcase" and then there is an open area—bedding—in the Exhibit 1—in the area designated C-3. What was in there the last time you saw it?

A. In this area?

Q. In the area between the bookcase and bedding? A. The last time I saw it?

Q. Just the general nature of the material that was in there, if you recall.

A. Well, I can't say with assurance whether I saw it absolutely the last time I looked.

Q. You couldn't specifically identify it?

A. Not specifically, no.

Q. All right. Now, you may take the stand.

Would you spend some weekends up with your father and mother there at that home even after you were married?

A. Yes. My husband and I both spent vacations up there.

Q. Did you father—was it a habit or a custom or did he frequently go down into the basement when he was in his bathrobe and slippers?

A. I never lived at 1082 Miller, but that was

(Testimony of Charlotte H. Gustafson.)

the custom of his when we were living at 900 Shattuck Avenue, which was the house in which I lived with my family prior to my marriage. [415]

Q. Was it the custom of the family to get up early or late on these weekends?

A. Late.

Q. They were late sleepers? A. Yes.

Q. Incidentally, did you go into the room marked "Storage" to get things out from time to time? A. Yes, quite often.

Q. At any time that you ever went in there did you ever see any guns kept in there?

A. I never saw any guns in there ever.

Q. Did you see the two guns that were in there after your father's death?

A. Yes, I think I saw them.

Q. Had you seen those before the last time you were in there? A. No, I had not.

Q. Did you ever discuss with your father the condition of his health or did you——

A. No.

Q. Did you ever hear him complain about any ailments? A. No, I did not.

Q. Did you ever know of any serious illness that your father had? A. No. [416]

Q. You knew he did have sinus trouble, did you not? A. Yes, I did.

Q. He took some medicine for that?

A. I believe he did.

Q. Did you know Robert Utley?

A. Yes, I did.

(Testimony of Charlotte H. Gustafson.)

Q. Will you state who he is?

A. He is the son of Harry Utley and the brother of Virginia Wilkerson and a friend of my father's.

Q. You met him where?

A. And a friend of my father's.

Q. And a friend of your father's. Where did you meet him?

A. I met him in Oregon through his father, through Harry Utley and my dad.

Q. Can you fix approximately when you met him, how long you have known him?

A. I suppose the first year that we had the Oregon property up there.

Q. Do you recall about what year that was?

A. No. It must be some place in the notes. I think it was after I was married.

Q. When were you married?

A. Well, I was married in '51, so it was probably the summer of '51.

Q. That was the first time you met him, about the summer [417] of 1951?

A. Yes, I think so.

Q. Did you see how much your father drank at different times when you were out and around the home when he was present? A. Yes.

Q. And will you just state in your own words what you observed of your father drinking and at such times as you observed it over the years as you knew him and when you saw him up until the time of his death?

(Testimony of Charlotte H. Gustafson.)

A. Well, when he would come with my mother for dinner at my house we wouldn't have anything to drink, and when we would go up to their house for dinner sometimes we would have something to drink, sherry or beer or a highball, before dinner, sometimes nothing. I can positively say that I never saw him intoxicated in my life, ever.

Q. Did you ever see your father in a condition from drinking alcohol where he would be high or couldn't walk straight? A. Never.

Q. Or couldn't talk coherently?

A. Never.

Q. Or what you would call drunk?

A. Never.

Q. Or intoxicated?

A. Never, no. [418]

Q. Did you ever hear your mother, your sister, yourself—did you ever have reason to complain to your father about his drinking? A. No.

Mr. Angell: I think that is all, then.

The Court: Take the recess.

(Short recess taken.)

CHARLOTTE H. GUSTAFSON

recalled as a witness on behalf of the plaintiff; previously sworn.

Cross-Examination

Mr. Clausen: Q. As I understand your testimony, Mrs. Gustafson, on the 22nd of February of last year you were not at the house.

A. I was not.

(Testimony of Charlotte H. Gustafson.)

Q. And, as a matter of fact, you never had lived at this house?

A. I had never lived at this house.

Q. When was it that you saw—I believe you said two guns in the storage room?

A. When was it?

Q. Yes.

A. Whenever I would go to wash. I believe I indicated how I hung my laundry, so that I was facing into that northwest corner or northwest part of the room, and I had a chance to [419] observe then when I was washing, when I was down there to iron.

Q. When was it that you observed the guns in this storage room to which I am pointing here (indicating)?

A. I have never seen guns in that storage room.

Q. Well, didn't I understand your testimony that after——

A. After daddy's death I believe I saw them.

Q. My question now, Mrs. Gustafson, when that was.

A. Oh, a day afterwards.

Q. All right. That would be February 23, 1954?

A. Yes.

Q. By the way, what kind of guns were they that you saw in this storage room to which I am pointing here (indicating)?

A. They were long ones, either rifles or shotguns—not pistols.

Q. Either rifles or shotguns?

(Testimony of Charlotte H. Gustafson.)

A. That is what I said.

Q. All right. Now, would you please come to the blackboard for me?

You mentioned that you had, before the death of your father, before the 22nd of February, last year, seen ammunition on a bookcase?

A. Yes, sir.

Q. Would you point to that bookcase?

A. (Indicating) There.

Q. I will mark that G-1 (counsel designating on Plaintiff's [420] Exhibit 1).

And so there is no question about it, will you point to the storage room where you saw the guns on February 23, 1954?

A. (Witness designating.)

Q. I will mark that G-2.

(Counsel designating G-2 on Plaintiff's Exhibit 1.)

That is all I have. Thank you.

Mr. Angell: No further questions.

(Witness excused.)

LEROY HANSCOM

called as a witness on behalf of the plaintiff; sworn.

The Court: What is your name?

A. Leroy Hanscom.

The Court: Spell the last name.

A. H-a-n-s-c-o-m.

The Court: Where do you reside?

A. 66 Domingo Avenue, Berkeley.

The Court: Your business or occupation?

(Testimony of Leroy Hanscom.)

A. I am an attorney at law.

The Court: How long have you been so engaged?

A. Some twenty-five or thirty years, your Honor.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. You are one of the partners of Mellin, [421] & Hanscom, are you not?

A. I am, sir.

Q. You specialize in patent law?

A. I do.

Q. You have been a member of the bar of California for approximately twenty-five years, is that right?

A. No, approximately twelve or thirteen years.

Q. And you were practicing patent law before that? A. Right.

Q. You knew Mr. Houston in his lifetime?

A. I did.

Q. When and where did you first meet Mr. Houston?

A. As I recall it, I met him at one of the Berkeley municipal camps, oh, some eight or nine years ago.

Q. And then did you become friends at that time or some time later?

A. Our friendship started at that time. The family was there, including Mrs. Spaulding.

Q. Mrs. Spaulding is who?

A. Mrs. Spaulding is Mrs. Houston's—Mrs. Clayton's mother.

(Testimony of Leroy Hanscom.)

Q. And that friendship kept up over the years until his death? A. It did.

Q. And would your family visit at the Houstons' and the [422] Houstons visit at your house?

A. Very frequently.

Q. Did you attend social functions with the Houston family?

A. Yes. We belonged to—aside from exchanging of dinners at each others' homes, we belonged to a dancing club.

Q. And what kind of a dancing club was that?

A. Well, primarily for folk dancing.

Q. Neighborhood affairs, friends in the area around Berkeley? A. That's right.

Q. And people who have been friends for many years, is that right? A. Right.

Q. Did you have Mr. and Mrs. Houston to your home for dinner on the Sunday night of February 21, 1954? A. We did.

Q. And what time did they come?

A. My recollection is that they came about six or six-thirty.

Q. What time did they go home?

A. About eleven o'clock.

Q. And did you have any drinks that night?

A. We did.

Q. How many? [423]

A. I would say two drinks before dinner.

Q. Before dinner. Any after?

A. None after.

Q. Did you observe Mr. Houston that evening

(Testimony of Leroy Hanscom.)

as to whether he was in good or bad spirits, whether he seemed depressed or happy, jovial?

A. My recollection is that he was his usual jovial self.

Q. Did he join the conversation with those present? A. Certainly.

Q. Was there joking going on in that conversation—laughing?

A. Yes. I recall that we ribbed each other about our neckties, which finally resulted in our exchanging neckties.

Q. You took his and he took yours?

A. That's right. And I think I had gotten trifocal glasses and we had a little discussion about that because he wore the same kind of glasses and they were somewhat new to me at that time.

Q. Did you notice any difference in Mr. Houston's action or demeanor or speech which was any different than at other or previous occasions that you had been with him, on social occasions?

A. Not a particle.

Q. Now, over the years that you have known Mr. Houston, from time to time have you been places where Mr. Houston was drinking? [424]

A. In my home and in his home.

Q. Will you just tell the court in your own words about the extent of drinking, on those occasions when you were present and you saw?

A. Well, in my home it was the usual practice to ask a guest if they wanted a cocktail, a drink of any kind, and we would have one round, and if

(Testimony of Leroy Hanscom.)

any of them wanted to they would feel free to take it. That would be about the extent of it there.

In the Houston home about the same thing occurred. I know they oftentimes preferred beer to whisky. As a matter of fact, I distinctly recall that we celebrated the two preceding New Year's with them and when the whistles blew at midnight, why, it was a can of beer that we celebrated with.

Q. Have you at any time ever seen Mr. Houston intoxicated?

A. I have never seen him intoxicated.

Q. Have you ever at any time in your long acquaintance with him ever seen Mr. Houston under the influence of alcohol to the point where he was not coherent and entirely clear in his speech?

A. I have never seen him where—even when he has had a drink or two—that it seemed to make a particle of difference to him.

Q. Will you describe Mr. Houston's disposition, to the court, just as you observed him, as to what kind of a man he [425] was?

A. Well, Mr. Houston was a very vigorous sort of man, a very genial—for example, when he greeted you you had no misgivings that you had been properly greeted. I don't think as far as I know, there was ever any fluctuation—he always seemed to be of an even temperament and always very jovial and congenial.

Q. Was he a nervous type of individual?

A. I wouldn't consider him so, no.

Q. You say he was a happy personality?

(Testimony of Leroy Hanscom.)

A. Decidedly so.

Q. Enjoyed talking politics?

A. He enjoyed doing anything. He enjoyed living.

Q. Sports? A. Particularly sports.

Q. Active in his church?

A. Yes, he was.

Q. You observed Mr. Houston in his home life?

A. Certainly.

Q. Did you ever observe any discordant note in the family?

A. On the contrary, he was always—had a very affectionate nature toward both his wife and two daughters.

Q. All the years you knew Mr. Houston did you ever hear him make any statement whatsoever that he was going to take his own life or that he would commit suicide? [426] A. Never.

Q. Incidentally, was Mr. Houston given to jokes, playing jokes?

A. Well, as represented by the little mutual ribbing, exchanging our ties, things of that kind; I wouldn't call him a practical joker by habit.

Q. Had you ever been on any hunting or fishing trips with him? A. No.

Q. You are not a hunter, I take it.

A. I am not.

Mr. Angell: That is all.

(Testimony of Leroy Hanscom.)

Cross Examination

Mr. Clausen: Q. Mr. Hanscom, as I understand it, you have been a friend of the Houston and Clayton family then for some time?

A. I have.

Q. As a friend, when did you first learn of the shooting which occurred on Washington's Birthday last year? A. The day that it occurred.

Q. And can you tell me about when, the time of the day you heard that?

A. I think it was in the middle of the afternoon.

Q. About——

A. Three o'clock—well, I couldn't say that. [427]

Q. Well, is that your best estimate?

A. No, I would say it was nearer five. I learned of it through my older son.

Q. And did you at that——. You got the report from your boy, did you? A. I did.

Q. And was that the boy who is married now to one of the daughters of Mr. Houston?

A. He is.

Q. And did you assist in getting for the family an attorney? A. I did.

Q. And was that done on that very day?

A. No.

Q. When?

A. Well, Mrs. Houston's two brothers immediately came out from Colorado. They visited me I would imagine at my office; so it must have been the following Tuesday, Monday being a holiday.

(Testimony of Leroy Hanscom.)

Q. In other words, the day after the shooting, is that correct?

A. I would place it at that, yes.

Q. At that time did you have a conference with Mr. Angell? A. I think it was that day.

Q. Was Mrs. Houston present?

A. I don't think Mrs. Houston was present. [428]

Q. And was this done at the request of Mrs. Houston?

A. What was done at the request of Mrs. Houston?

Q. Your talk with Mr. Angell.

A. Well, I think that her two brothers, after conferring with me and after I had suggested that Mr. Angell be employed to handle whatever legal matters were required, and the two brothers conferred with Mrs. Houston, and as a result of that conference then we met with Mr. Angell.

Q. And you say "we met with Mr. Angell"; that was yourself, Mrs. Houston and Mr. Angell?

A. I was present. Maybe Mrs. Houston was present.

Q. Your recommendation then of Mr. Angell was on February 23, 1954, and this was conveyed to the two brothers of Mrs. Houston?

A. Well, my recommendation was conveyed to the two brothers of Mrs. Houston prior to the time of Mrs. Houston consenting—acquiescing to my recommendation.

Q. And your recommendation then was—and

(Testimony of Leroy Hanscom.)

the consent for the employment of Mr. Angell—was that all in the same day?

A. I don't recall. It had to be done in a rather short time because the boys had left their business in Colorado and they had to get back to it, so things were done rather promptly.

Q. Well, is it your recollection then that [429] this was all done on the same day following the death?

A. I don't know whether it was done the same day or whether it was done in two days.

Q. Well, you put it within two days, would you?

A. I would say that is my best recollection, yes.

Q. Within that time did you have a talk yourself with Mr. Angell? A. Oh, undoubtedly.

Q. Did Mrs. Houston? A. Yes.

Q. Now, did you also assist in—. You discussed, did you, the insurance features of this case?

A. Well, I knew nothing of the insurance features of the case until some time later.

Q. You left that to Mr. Angell? A. Yes.

Q. And did you do anything in assisting Mrs. Houston or the family in the employment, in addition to the attorney, of any investigator?

A. No, I had nothing to do with that.

Q. Anything in reference to the Coroner or the Coroner's Office or any of the Coroner's deputies? A. No.

Q. Or in reference to any of the police or the police officers or the police department of Berkeley? [430] A. No.

Mr. Clausen: That is all.

(Witness excused.)

DONALD C. CAMPBELL

called as a witness on behalf of the plaintiff; sworn.

The Court: Your full name, please?

A. Donald Charles Campbell.

The Court: Where do you reside?

A. 239 University Avenue, Davis, California.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. Where do you reside?

A. 239 University Avenue, Davis, California.

Q. What is your business or occupation?

A. I am employed by the Department of Agriculture, University of California, and I am also a student at the University of California at Davis.

Q. Do you know the Houstons? A. I do.

Q. You knew Mr. Houston during his lifetime?

A. Very well.

Q. How long had you known the family?

A. I have known Mr. Houston since about 1947.

Q. What was the occasion of your meeting him?

A. I met him through his daughter Ann Houston. [431]

Q. Which one? A. Ann Houston.

Q. And how did you come to know the daughter? Did you go there to see the daughter?

A. I met him—he took quite a few couples to a party down at Half Moon Bay on Ann's birthday in the spring of 1947.

(Testimony of Donald C. Campbell.)

Q. That is when you were in junior high school?

A. Junior high school.

Q. At Berkeley? A. At Berkeley.

Q. And Mr. Houston took this little group down for Ann's birthday, is that right?

A. Yes, that's right.

Q. Just as briefly, and as quickly as you can, how close were you to Mr. Houston, to the Houston family, in the years that ensued from 1947 up to the death of Mr. Houston?

A. Well, I considered myself practically a son of Mr. Houston and we were very close together.

Q. Did you spend a great deal of time together?

A. Yes, practically all the time that we had free.

Q. Did you have a father?

A. No, my father was deceased.

Q. And so you went with Mr. Houston a great deal, is that correct? A. Absolutely. [432]

Q. You regarded him as a father?

A. Absolutely.

Q. Now, did you hunt with Mr. Houston?

A. Practically every trip. He never made a hunting trip without me unless it was absolutely impossible that I could get away from school or something else. We were—I usually could get excused, though.

Q. And over what period of time was that, Donald?

A. Well, it started in 19—in the summer of 1947. Mr. Houston came up to where I was run-

(Testimony of Donald C. Campbell.)

ning—I had a—I worked as a packer, and I went in with Mr. Houston that summer on a pack trip for about a week. He rented some horses from my company, the company I was employed by.

Q. This association extended over what period?

A. How do you mean, sir?

Q. Well, you said you first met him in 1947. How long did this continue?

A. Up until I was shipped overseas—I was in the service, and I was overseas in 1953, the spring of 1953, I think it was.

Q. And then did you not return—you did not return until after Mr. Houston's death, is that correct?

A. Yes, that is correct.

Q. When did you go into the army?

A. I went into the army November 3, 1952. [433]

Q. And were you stationed around here from 1952 until you went overseas in the spring?

A. Yes. I was stationed at San Luis Obispo, but I was home weekends.

Q. While you were in the army—was it the army you were in?

A. Yes, sir.

Q. What part of the service?

A. I was in the Signal Corps.

Q. Signal Corps?

A. Yes.

Q. And would you come up and make hunting trips with Mr. Houston?

A. Every weekend I made it home, one way or the other.

Q. Did you ever bring any boys up with you?

A. Well, once in a while, yes.

(Testimony of Donald C. Campbell.)

Q. And where would you go to hunt over these years, will you just tell us briefly, the area you and Mr. Houston hunted in during the time you were hunting with him?

A. Over the number of years that I knew him?

Q. Yes.

A. It included quite a territory. He took me first on a trip back to Montana where we went up through Oregon, Washington and proceeded over to Montana, and we hunted in a number of the States that we went through. It was a combined business and pleasure trip, it was to bring better relations between [434] his associates and the company or who represented his company, which at that time was the Fire Association, and we went back to take some of these men on a trip in Montana. This trip was—well, we had persons like the Senator of Utah and a number of other people with us on this trip.

Q. Well, now, just tell us, first, the territory you covered. You covered Montana?

A. Yes, Montana, all—quite a bit of California, Oregon and we had a trip in Nevada, and, well, I think that covers the States, but that includes quite a number of trips.

Q. And did you ever have any trips, hunting or fishing, when officers or directors of the New Zealand Insurance Company were along?

A. Absolutely. We certainly did. We had the United States—not the the United States—the world manager or the New Zealand Company

(Testimony of Donald C. Campbell.)

world manager, who was here in 1948, and went on numerous weekend trips with Mr. Houston and Ann Houston at that time and myself. We went out on horseback trips out on the other side of Walnut Creek, and in 1949 when Mr. O'Brien returned we continued our friendship out there because he really enjoyed it; it was a new experience for him, he had never been—he had never ridden a horse before that time, and he thought it quite an honor that he could learn to ride.

Q. What is Mr. O'Brien's position in the New Zealand company?

A. He is the world manager for the New Zealand Insurance [435] Company.

Q. And what about Sir James?

A. Sir James?

Q. Did you meet Sir James?

A. Sir James Gunson. He at that time was our board of directors chairman—he was here in 1952, I believe it was, and he took a trip with Mr. Houston, Mr. Wilkes and Mr. Wilkes' son and myself to Oregon. We went up there early in the spring on a fishing trip and we had quite a time getting Mr.—Sir James, who was an elderly man—we had to ferry him across this stream.

Q. How old was he, Mr. Campbell? You said an elderly man.

A. He was in his seventies.

Q. He was in his seventies.

A. But an active man. He liked that kind of a life.

(Testimony of Donald C. Campbell.)

The Court: Life begins at 80.

Mr. Angell: That's right, Your Honor.

Q. Was there anything unusual that happened on that occasion that seemed to have any interest to Sir James?

A. Well, I think that the main interest to Sir James was getting ferried across this stream to Mr. Harry Utley's cabin. Mr. Houston and I had to take off our clothes and paddle—swim alongside of the canoe to get him across to the cabin because it was quite a treacherous stream and he got quite a—well, quite a lot of enjoyment out of it. [436] He thought that was quite a thing to be able to do.

Q. And Sir James is from New Zealand, is he not?

A. Yes he is.

Q. And did Sir James on that occasion make any comment to you or was there anything you heard regarding what he thought of Mr. Houston?

A. Yes, he——

Mr. Clausen: Well, Your Honor, we object to that as hearsay and far afield.

The Court: Objection sustained.

Mr. Angell: Well, if Your Honor please, the purpose of offering this is that counsel has tried by every innuendo and inference here, by putting in documents here, which I think are clearly inadmissible, under the guise that it shows something to worry about, to show in some way that the relationship between the New Zealand home office and Mr. Houston was in such a condition that he was worried about it.

(Testimony of Donald C. Campbell.)

The Court: It hasn't registered in my mind as yet.

Mr. Angell: Beg your pardon?

The Court: It hasn't registered in my mind.

Mr. Angell: All right, Your Honor.

Q. Now, on these various trips that you would take, in all the time that you were with Mr. Houston, did you have an opportunity, and did you, Mr. Campbell, observe Mr. Houston's nature, his actions? [437]

A. By all means, I certainly did.

Q. Now, would you say that Mr. Houston was ordinarily a happy man who enjoyed life?

A. He enjoyed it more than anybody I have ever met before or since.

Q. Did you ever hear Mr. Houston at any time or any place mention anything about taking his own life? A. Why, absolutely not.

Q. You saw Mr. Houston's drinking habits, did you not? A. Yes, I certainly did.

Q. And will you just tell the Court in your own words what you saw as to Mr. Houston's drinking habits and on these various trips and hunting, when you were with him socially, just what you observed.

A. Well, he would have a drink with everybody else and along with everybody else, but by no means, he was not an alcoholic by any way that you could picture him. He was—he just was a social—would drink right along with the crowd and very—and up to a certain point, and he would cut off. He had a big responsibility and we were with business

(Testimony of Donald C. Campbell.)

men under him on practically on all trips and he couldn't afford to——

Mr. Clausen: Your Honor, we will ask the last part go out.

Mr. Angell: We have no objection to it going out. [438]

The Court: What he could afford to or not to do may go out.

Mr. Angell: Q. Did you ever see Mr. Houston on any of these trips under the influence of liquor?

A. By no means.

Q. And did you ever see him when he was unsteady on his feet or incoherent in his speech?

A. Why, certainly not.

Q. Did you ever see him when he couldn't drive his car with safety?

A. Why, I wouldn't go out with him if I thought that it was unsafe.

Q. Did he usually do the driving?

A. Well, we took turns.

Q. You took turns? A. Yes.

Q. Now, you heard one of the witnesses here testify or heard a deposition read that on one occasion Mr. Houston went into Mr. Harry Utley's office and discharged a firearm and said something about shooting an ear off a deer; do you recall that testimony? A. I do.

Q. Were you with Mr. Houston on the occasion when a firearm was discharged in Mr. Utley's office? A. I do, and I would like to state——

Q. Just state——

(Testimony of Donald C. Campbell.)

A. —something about that time. If I may. At that time he had—we had these blank 22 shells—

Mr. Clausen: Your Honor, I don't know what the witness is going to state—it is a voluntary statement. I think he should—

Mr. Angell: I have asked him—

Mr. Clausen: It should be by question and answer.

The Court: Ask the question.

Mr. Angell: Q. Were you ever present when Mr. Houston discharged a firearm in Mr. Utley's office? A. Yes.

Q. And what kind of a firearm was that?

A. The firearm was a 22 pistol with blank cartridges. May I add—

Q. And at that time did Mr. Houston aim at the deer and pull the trigger?

A. Yes. And may I state something else about that?

Q. If it is explanatory of that incident.

Mr. Clausen: I think, Your Honor, if the witness is going to state something, he should be asked the question.

Mr. Angell: I don't know what he wants to state.

The Court: If he wants to explain, he may. He may explain.

Mr. Clausen: I didn't so understand. [440]

The Court: Did you say that you wanted to explain something? A. Yes, sir, Your Honor.

The Court: Well, explain.

(Testimony of Donald C. Campbell.)

A. Something of that nature in that town is certainly not of order, in a small community such as Lakeview, and by no means anybody would think anything, that that was really out of order or anything for somebody to do that——

Mr. Angell: Q. Well, you mean——

A. ——such a state as that.

Mr. Angell: I have no objection. I have no objection to it going out.

Mr. Clausen: May that go out, Your Honor?

The Court: It may.

Mr. Angell: No objection.

Q. Did Mr. Houston sometimes carry blank cartridges, which he discharged for——

A. Yes, we did.

Q. What was the purpose of that? For fun or was it—Did it have some purpose, if you know?

A. No purpose. That was no purpose of harmful effect, that's——

Q. You observed Mr. Houston's manner of dress as he went on these trips with you, did you not?

A. Yes, I did.

Q. Did you see anything different in his manner of dress than [441] other people of that locality? A. Why, certainly not.

Q. Did you ever see him with a coonskin cap?

A. He never had a coonskin cap in his life that I know of.

Q. Do you regard or describe Mr. Houston as a clown?

A. Not as a clown as such. He liked to be able

(Testimony of Donald C. Campbell.)

to express himself, but he wasn't—he wouldn't clown around. He was a very vigorous man, but he wasn't a clown, by no means.

Q. He has been described by Mrs. Wilderson, one of the the witnesses—I believe it was Mrs. Pearson—Mrs. Pearson, the waitress, as a “big shot.”

Did you ever see Mr. Houston conduct himself as what you would say is a big shot?

A. Possibly to an introvert or something, that he would appear to be a big shot, but I never had that occasion to be able to call him a big shot.

Q. And, incidentally, was Mr. Houston a pretty good sportsman?

A. By me—in my classification, he was the best I have ever hunted with or fished with or rode with or roped with or any such thing as that.

Q. Was he an excellent shot?

A. Absolutely a perfect shot.

Q. A vigorous hiker?

A. He certainly was. He could outhike me. [442]

Q. He was a vigorous hiker and active?

A. Active in everything he undertook.

Q. Did you ever hear him complain about being sick or feeling bad?

A. Why, certainly not. He did have a sinus trouble and he used—it used to bother him when we were out riding and there was quite a bit of dust, but—when we were driving cattle or horses or such as that—but, other than that, he would wear a bandanna to protect his nostrils—but other than that he

(Testimony of Donald C. Campbell.)

never had any. He possibly had a football knee, he called it, that would swell up a little when we would hike-hunt all day or fish or such as that.

Q. Could he do a pretty good job of hunting and fishing all day?

A. He prided himself on being good at such things and he coached me so I would be right up there with him, so that nobody could outdo us. We were—he liked to see us be able to catch more fish or such as that.

Q. I will show you what purports to be a letter on the letterhead of William M. Houston, dated December 22, 1953.

Mr. Clausen: Just a moment.

Mr. Angell: Let me identify it first, for the record.

Mr. Clausen: We will object to the letter, your Honor. It is just apparently a social letter from Mr. Houston to this witness. We object on the ground that it is hearsay, [443] no bearing on any issue in the case, far afield, merely a social letter.

Mr. Angell: Unless I can get it identified, your Honor, and give it to your Honor to see what it is, why, it is kind of address ourselves to it.

Q. Did you ever see this letter before?

A. Yes, I did.

Q. You gave that to me, did you not?

A. I did.

Q. Did you receive that in the usual course of mail? A. How do you mean by——?

Q. Was it sent to you?

(Testimony of Donald C. Campbell.)

A. Yes, it was sent to me.

Q. Where were you when you received it?

A. I was overseas in Japan at the time.

Q. Do you recognize the handwriting?

A. I certainly do.

Q. Whose is it?

A. It is Mr. William M. Houston's.

Q. This was a letter written by Mr. Houston to you, and it is signed at the bottom "Bill." Is that the way Mr. Houston usually addressed—signed his letters?

A. Yes, sir.

Mr. Angell: I will ask that it be marked for identification. [444]

The Court: Let it be admitted and marked for the purposes of identification.

The Clerk: Plaintiff's Exhibit 9 marked for identification.

(Handwritten letter dated 12/22/53, William M. Houston, to "Dear Don," marked for identification Plaintiff's Exhibit No. 9.)

Mr. Angell: I now offer this in evidence, your Honor. And the purpose of this offer is addressed to the state of mind of Mr. Houston just prior to the date of his death or within a reasonable time thereof, to show that at least at this time Mr. Houston was not contemplating self-destruction.

Mr. Clausen: What is the date, counsel?

Mr. Angell: December 22, 1953, just two months before.

Mr. Clausen: We make the objection, your Honor, that I just urged.

(Testimony of Donald C. Campbell.)

The Court: For the limited purpose of the offer, I will allow it. Objection overruled.

Mr. Angell: I offer it in evidence as Plaintiff's Exhibit 9.

The Clerk: Plaintiff's Exhibit 9 admitted and filed in evidence.

(Whereupon Plaintiff's Exhibit No. 9 for identification was received in evidence.)

Mr. Angell: I would like to read this, your Honor, into [445] the record: (Reading)

"Dear Don:

"Please forgive me, old boy, for my too long delay in again writing you. Charlotte and I have just returned from New York. We were in time to attend"——

Q. I think maybe you better read it, if you can,— I think you can do a better job than I can because I can't read handwriting.

A. (Reading)

"Dear Don:

"Please forgive me, old boy, for my too long delay in again writing you. Charlotte and I have just returned from New York. We were in time to attend Barbara's wedding."

My sister.

"She was beautiful. Edward is a fine fellow and a clean-cut, good-looking chap. Your mother was just as pretty as Barbara.

"Don, accept this letter as a merchandise money order for a 12 gauge shot gun to be bought and given

(Testimony of Donald C. Campbell.)

you on your return. This is your Christmas present. I haven't opened my box yet from you.

"Merry Xmas. Bill."

Mr. Angell: Now I will offer another letter, on the stationery of New Zealand Insurance Company, Ltd., dated [446] January 22, 1954, just a month before Mr. Houston's death, and it purports to be a letter from Mr. Houston to the witness.

Q. I will ask you if you received that letter.

A. This is the one I received.

Q. And you gave it to me? A. I did.

Mr. Angell: The same purpose of the offer as here is to show the state of mind of Mr. Houston on the date the letter was written. I will offer it as Plaintiff's Exhibit 10.

Mr. Clausen: Same objection, your Honor, as I made immediately prior to the prior offer.

The Court: What is the date of this letter?

Mr. Angell: Just a month before Mr. Houston's death.

The Court: For the limited purpose, I will allow it. Objection overruled.

The Clerk: Plaintiff's Exhibit 10 admitted and filed in evidence.

(Whereupon letter dated January 22, 1954 was received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Angell: (Reading)

"Dear Don:

"As usual I am awfully slow in answering and [447] catching up with my personal correspondence,

(Testimony of Donald C. Campbell.)

what with this being the end of the year and our efforts to get out our Annual Statements. First off, that fly rod which you sent me looks to be a dandy, it's properly balanced, light weight and I'm sure it will work first class. Thanks a million, I do appreciate your thoughtfulness and also thank your pal, Cliff Hawkins, for dispatching it to me in your behalf.

Now for some news. Harry Utley was remarried on New Year's Day, January 1st, to Mrs. Irma Claus. Mrs. Claus is 55 years old, a widow of 12 years, has two married children, one son and one daughter, and about ten grandchildren. She owns a ranch or two in Lake County and also owns six or eight of the big rental producing buildings in Lakeview. So she has her money and Harry has his and we know they did marry for companionship. Honestly though, Don, they act like a couple of sixteen year old kids, they are so much in love and are having so much fun. They were married here in San Francisco and Charlotte and I attended the wedding. Ralph and Mrs. Renner, Harry and his new Wife, Irma, will be leaving for Mexico, Lima, Peru, Argentina, Brazil and back here to California through the Panama Canal in about ten days or two weeks. Ralph and Jane Renner were in town yesterday and I talked to them on the telephone. [448] All of them are greatly excited at the prospect of a trip to South America and of course they always ask me about you and when you're going to get home. Irma inquired about getting one of those Japanese fly rods

(Testimony of Donald C. Campbell.)

for herself so Harry asked me to ask you if you could get hold of one and ship it over and he will see that you are reimbursed for the cost. If you do have the time and can make it, it would be nice if you would send one of those Jap fly rods to Mrs. Harry A. Utley in Lakeview, Oregon, it should arrive sometime before they get back from their South America trip.

"I never did get to New Zealand last year as was anticipated but Charlotte and I did take a trip to New York and as I think I told you in my last letter and got back just in time to attend Barbara's wedding. I haven't seen your family for quite some time and intend to drop by there early one morning for a visit so of course I can't give you any news. I saw your granddaddy at the wedding and he sure did look fine, and he was sure proud of Barbara and her new husband.

"Don, I appreciate the pictures which you sent me, particularly the one with you behind the machine gun on the back of which you had written "deer hunting". Well next fall you should be able to get in some deer hunting, goose hunting and duck hunting, and, believe [449] you me, I am looking forward to it as I know you are. Best of luck, and boy will I be glad when you get home.

"Sincerely, Bill."

Down at the bottom of the letter is a postscript:

"I saw your mother, grandmother, Barb and Rick last Saturday morning. They are all well. We went through all your pictures and had fun."

(Testimony of Donald C. Campbell.)

Q. Did Mr. Houston contemplate taking you into any business with him at any time, Mr. Campbell?

A. He did that.

Q. And what business?

A. He wanted me to take over the ranches in Oregon for him as soon as I was back from the service.

Q. Will you briefly describe for the Court and for the record those ranches?

A. Well, there was two of them on Goose Lake near Lakeview, Oregon. One of them was pertaining mostly to raising grain and alfalfa.

Q. How many acres on that one?

A. It was—golly, I don't remember.

Q. Briefly,—if you don't, why,—

A. Somewhere around 500 acres, I would say.

Q. Yes. Now, what about the other one?

A. Well, the other one was about half—about half of it was put into permanent pasture and the other half was rough [450] grazing land, and it was not quite as large—it was around 400 and some acres, something to that effect.

Q. Now, you were studying at Davis or contemplating studying to go into that business, were you not?

A. I had been before I went into the service.

Q. Now, I will show you a dictionary which seems to be of an old vintage, and it was printed in 1948, so it's not as old as it looks to me, and down the fly leaf of which is—there's a handwriting and

(Testimony of Donald C. Campbell.)

signed "Bill." And I will ask you if that fly leaf was attached when you first saw it.

A. Yes, it was part of the book when I first got it.

Q. What was the occasion of your getting this book?

A. Mr. Houston didn't like the way I spelt.

Q. He didn't like the way you spelled?

A. He didn't like the spelling in my letters, so he sent me this book when I was in Japan.

Q. He sent it——

A. He sent the book to me in Japan.

Q. And was this inscription on the sheet which is attached there now?

A. Yes. That broke out during the process of coming—shipping home from Japan.

Mr. Angell: Offer the inscription, your Honor, as Plaintiff's Exhibit next in order for the same purpose, to merely show a state of mind at or about the time or close [451] enough to it to show a state of mind of Mr. Houston. I wish the record to show that this was sent to the witness within a very few days of the time the policy of insurance was to take—the application was filed.

Mr. Clausen: Well, we will object, if the Court please, on the same ground as the other two offers.

The Court: Let the record so show. It will be admitted and marked.

The Clerk: Plaintiff's Exhibit 11 admitted and filed in evidence.

(Testimony of Donald C. Campbell.)

(Whereupon inscription was received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Angell: This is short and I will read it into the record. It says:

"To my Pard Pal and Associate "to be" in the ranch and livestock business in Lake County, Oregon. Faithfully. (Signed) William M. Houston, Friday, September 25, 1953—your mother's 42nd birthday. Bill."

Mr. Angell: Q. Were you ever at the Houston home in the years that you knew Mr. Houston?

A. Many, many times.

Q. Were you ever down in the basement, in the area shown on this Plaintiff's Exhibit 1 which is the exhibit on the board? [452]

A. I was, certainly.

Q. And when did you first become familiar with that basement?

A. When they first got the house, was the first time.

Q. And were you in there many, many times after? A. I certainly was.

Q. And what was the occasion when you would be down in that basement?

A. Well, I kept a lot of my equipment down there with Bill. When we came back from trips sometimes I would leave my stuff at his house instead of bringing it down to my place.

Q. You are not married, are you?

A. No, I am not.

Q. Where do you live?

(Testimony of Donald C. Campbell.)

A. With my mother, when I am at home here.

Q. Would you store some of your sport equipment and hunting, fishing gear in this basement?

A. By all means.

Q. Are you familiar or were you familiar with the conditions and the objects in that basement at or about the time referred to, 1954?

A. No, not——. I was when — before I was shipped overseas in the service. Up until that time. That was—I said, I think, the spring of 1953. So I was up until that time.

Q. So your knowledge of what was in there would have been [453] prior to this spring?

A. Yes, it would.

Q. The spring of 1953. Well, now, taking it now as of the time that you knew it, just describe generally what that basement was used for.

Mr. Clausen: Object to that as being too remote in time. The witness wasn't in the country after the spring of 1953.

Mr. Angell: I think I can easily show there was no change between that time and up to the date——

The Court: It is rather remote.

Mr. Angell: It is remote as to time, but also that only goes to its materiality and certainly not as to its admissibility. The thing should—the thing I am trying to show through this witness—. Every other witness has testified to the same thing, and that's all I am trying to show.

The Court: I will sustain the objection.

Mr. Angell: All right.

(Testimony of Donald C. Campbell.)

Q. At such times as you hunted with Mr. Houston, do you know of your knowledge as to Mr. Houston's habits, whether he left his guns loaded or unloaded when he was not using them?

A. Well, it was a practice of Mr. Houston——

Mr. Clausen: We will object to that, if the Court please, on the same ground: too remote in point of time. Also, your Honor, there is no relation to the situation here of 1954. [454]

Mr. Angell: Speaking of habit——

Mr. Clausen: Speaking of hunting trips is different and the point of time is different. The witness wasn't in the country since the spring of '53.

Mr. Angell: This would be his habits up until that time.

The Court: Lay the foundation for this question.

Mr. Angell: Q. You went on hunting trips clear from '47 up to the spring of '53, when you left, is that right? A. I did.

Q. Did you observe Mr. Houston's habit with respect to leaving his guns or whether he took his shells out when he finished using his guns, his firearms? A. Yes, I did.

Q. Did you on any occasions ever see the guns left loaded when they were put away?

A. I did that.

Mr. Clausen: Pardon me. Just a moment. Same objection, your Honor: too remote.

The Court: Fix the time.

Mr. Angell: Q. When did you see that?

A. Many times in our——

(Testimony of Donald C. Campbell.)

Mr. Angell: Q. Just through what period of time did you see it and how many times?

A. Well, over the number of years we would—I observed it [455] through all my trips and stuff. I had certainly observed whether the guns were loaded or not. It was a safe—we were—had a safety factor in it——. I mean, he taught me to handle guns. I should know what his habits were.

Q. Well, do you know what his habits were?

A. I certainly do.

Q. What were they with respect to leaving guns loaded?

Mr. Clausen: May I ask the Court for the time to be fixed?

Mr. Angell: He fixed it over the whole time: '47 until he left in '53.

Mr. Clausen: I would assume that what would be the critical question would be when was the last time that he saw this practice.

Mr. Angell: Q. Do you want to answer that question or can you answer it?

A. Yes, certainly I can. The last time that I went on a hunting trip with Mr. Houston was—I can't fix the exact date, but it was just prior—before I went overseas in the spring of '53. We went out——

Mr. Clausen: That is, I believe, an answer to the question.

Mr. Angell: He is going to tell where he went.

Mr. Clausen: I understand. Your Honor, my objection is that it is too remote and it takes us into areas and places [456] on cross examination and

(Testimony of Donald C. Campbell.)

lengthy inquiries that, with all respect, don't help us on the critical question on the case.

The Court: There is considerable testimony in relation to the condition of these guns. I think it goes to the weight of the testimony. I will allow it. Objection will be overruled.

A. Would you repeat the question, please?

Mr. Angell: Q. The question is, do you know the habits of Mr. Houston with respect to whether he kept his guns loaded or unloaded when he was not using them? A. Yes, I do.

Q. And what was that habit?

A. It was a practice of Mr. Houston to keep his guns loaded. Now, let me—can I explain that to a certain degree? We would—he would always tell me that every gun was loaded. Possibly sometimes we wouldn't keep them—some of them wouldn't be loaded, but practically all the time you would find shells in our—in the chamber—not in the chamber but in the magazine of the guns.

The Court: Why did he do that?

A. We——. I have no idea. We were careful with guns. He taught me to be careful with guns. But he gave me the respect that all guns were loaded at all times, to treat them as such.

The Court: All right. [457]

Mr. Angell: Q. Now, did you see where guns were kept around the house, up at least until the time you went away in the spring of '53?

A. Yes, because I kept my own guns there at times.

(Testimony of Donald C. Campbell.)

Q. Where were they kept at that time?

A. With respect to the basement there?

Q. Oh, yes. Well, yes.

A. Should I show on the chart or just tell?

Q. You can just state it from where you are, generally where. Did he have a place where he put them?

A. Well, the majority of the time we kept them in the area of that raised platform. Now, myself, I kept them in that far corner at some times, and sometimes I kept them in the scabbard of the—on the saddle, that was attached to the saddle. But most of the time it depended upon what the situation was. There was no set pattern at all.

Q. That is what I——. There was no set pattern?

A. No, absolutely. We had no particular pattern of how we kept our equipment. We just didn't keep up any particular spot for every item.

Q. Do you know whether Mr. Houston had a set habit of where he kept his ammunition?

A. By no means.

Q. You heard the testimony read in here the other day that up in the Oregon country Mr. Houston was known as Wild Bill [458] Hiccup. Do you know where that name came from and whether it was—whether Mr. Houston was ever known by that name?

A. I know the originator and the sole purpose of that name. It started by Virginia Wilkes—Wilkinson, the name is. She didn't call him that. She said in her testimony—she said that it was a nickname. But

(Testimony of Donald C. Campbell.)

by no means was it the nickname. She painted a little board with a horse kicking a man and she put this Wild Bill Hiccup on it and put it up on the—on Mr. Houston's cabin. But by no means, he wasn't known as Wild Bill Hiccup in that country.

Q. Did you ever hear him called by that name at all?

A. Absolutely not, and I was there to know.

Q. I think I have asked you this, whether you knew or whether you ever saw Mr. Houston wear a coonskin cap.

A. Yes, you asked me that and I said no.

Mr. Angell: Take the witness.

Mr. Clausen: Just one or two questions, Mr. Campbell. As I understand your testimony,—

The Court: I was about to adjourn. Do you think you could get through with this witness?

Mr. Clausen: I have two questions.

The Court: Proceed.

Cross Examination

Mr. Clausen: Q. Just on this matter of the gun being loaded. As I understand your testimony, it was that as a [459] safety feature he told you to treat guns as loaded even though, as you would find out on occasions, they would not be loaded as a matter of fact.

A. Well, many times they were loaded and sometimes they weren't. There was no set pattern to it.

Q. That's right: he told you to do that, to assume they were loaded as a safety feature?

(Testimony of Donald C. Campbell.)

A. Yes, I would say that.

Q. He was careful with guns, wasn't he?

A. Yes.

Mr. Clausen: That is all.

Mr. Angell: That is all.

The Court: Take the adjournment until 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was taken to tomorrow, November 10, 1955, at 10:00 o'clock a.m.)

The Clerk: Houston v. Canada Life Assurance Company, further trial.

Mr. Angell: Ready, your Honor.

Mr. Clausen: Ready, your Honor.

Mr. Angell: Dr. Kirk.

PAUL L. KIRK

called as a witness on behalf of the plaintiff, sworn.

The Court: Your name, please.

A. Paul L. Kirk.

The Court: Where do you reside?

A. 1064 Creston Road, Berkeley, California.

The Court: Your business or your occupation?

A. I am professor of criminalistics in the University of California, and private consultant.

The Court: You are now associated with the University of California? A. I am.

The Court: For how long?

A. About 28 years.

The Court: Take the witness.

(Testimony of Paul L. Kirk.)

Direct Examination

Mr. Angell: Q. What is your business or profession, Dr. Kirk? [461]

A. I am professor of criminalistics, University of California. I have been at various times professor of biochemistry and criminalistics also, and at lower ranks in biochemistry.

Q. Have you done any work and familiarized yourself with ballistics? A. I have.

Q. As a part of your work.

A. I have taught——

Q. As a part of your work in criminal investigation.

A. I have taught the subject; I have investigated and I have testified in that field numerous times.

Q. And have you been an expert witness over many years last past?

A. About 20 years; I have testified as an expert in various matters.

Q. Just for the record and for your examination, can you state just a few cases in which you have been an expert witness, on particularly ballistics?

A. In the field of ballistics and firearms, investigation for army court martials in the Sixth Army C.I.D. at Fort Ord; I have testified in a number of accidental shootings; I have testified in several murder trials, including the Newson trial, which is well known in Alameda County. I can't recall all of them just at the moment, but I have testified in [462] numerous trials, numerous times.

(Testimony of Paul L. Kirk.)

Q. In numerous trials having to do with ballistics? A. That's correct.

Q. Were you employed in this case by myself, acting for Mrs. Houston, Dr. Kirk?

A. I was.

Q. Have you any record or recollection as to when, about, that was?

A. It was in the early half of March 1954.

Q. That was prior to the coroner's inquest, was it not? A. That is correct.

Q. And in connection with that employment, Doctor, did you visit the premises, the Houston home on Miller Street?

A. I did, on a number of occasions, yes.

Q. Have you a record of what the number of that house is? A. 1082 Miller Avenue.

Q. In Berkeley? A. In Berkeley, yes.

Q. Will you just state for the record the date that you went there?

A. I first went to the Houston home on March the 14th, 1954. I later returned on March the 19th and I was there briefly also on March the 24th—all in the same month, in 1954.

Q. While there, did you have occasion, in connection with your investigation, to go into the basement where the body [463] was found and the shot was fired, to observe the condition of that basement?

A. Yes, I examined the basement of that home on each occasion.

Q. And did you also examine the body?

(Testimony of Paul L. Kirk.)

A. I examined the body on March 17th in the Chapel of the Chimes, yes.

Q. The Chapel of the Chimes is in Oakland?

A. In Oakland, that's correct.

Q. On Piedmont Avenue?

A. Piedmont Avenue.

Q. Will you just step to the board, Dr. Kirk, and look at Plaintiff's Exhibit 1—which you have looked over briefly before you went on the stand, did you not?

A. That's correct, yes, sir.

Q. Will you, and as briefly as possible, describe the condition that you saw when you first went there?

A. Well, with respect to the chart on the board, the objects listed were all there, with the exception of the hole cut in the floor, which I cut myself on the 24th of March.

The bookcase, brooms and sweeper, bedding, chest, sofa—were all there.

In addition to that, there was, at the edge of the sofa, a trellis—that's one of these lath trellises such as you place in the garden for vines to climb on. [464]

There was also a lawn chair situated in front of the sofa and partially blocking the entrance to the back corner.

There were also some additional items in the front of the chest, notably some bedboards which were piled with the ends protruding somewhat into the passageway.

(Testimony of Paul L. Kirk.)

There was, at the time I saw the basement, a considerable number of items that are not shown in this chart, that is, in the particular area of the corner in which the shot was fired.

Q. Go ahead, Doctor.

A. That is my recollection, that nearly all the materials which I noticed that are not shown on here were in this area (indicating).

Now, on the righthand side, of course, there was a great amount of material piled here, which was not pertinent, which I did not make any record of nor pay any attention to.

There was a good more than shown in this corner.

Q. Did you take a photograph when you were there? A. I did.

Q. And I will show you Plaintiff's Exhibit 7 for identification and ask if that's the photograph you took.

A. Yes, this is a photograph which I took. It shows the lawn chair which blocks the entrance at a point below where this hole in floor is printed in the chart on the board.

It also shows, I believe, the bed—the boards are not shown. They might have been at the rear rather than in the [465] front. They certainly protruded here, I recall. They don't show in the photograph.

The other items here are about as shown, with the exception of the chair which is shown in this photograph.

Mr. Angell: Now, your Honor, I will offer Plain-

(Testimony of Paul L. Kirk.)

tiff's Exhibit 7 for identification in evidence as Plaintiff's Exhibit 7.

Mr. Clausen: To which we object, your Honor, on the ground, as the witness now testified, the picture does not depict what he saw. He just now explained some things were there and some things were not.

Furthermore, the witness did not see the scene on the date with which we are concerned, namely, February 22, 1954. Quite the contrary, as I understand from his testimony. He wasn't there until March the 14th for the first time.

For that reason, because the picture is not a true condition and furthermore, because it does not depict as of the time we are concerned with, we object, no proper foundation; we object to the photograph.

Mr. Angell: May I reply, your Honor, and my reply is just this, that the picture was shown to Mrs. Houston over the objection of counsel and Mrs. Houston said that it correctly depicted the things shown there on February 22, 1954, at the time Mr. Houston was shot in that basement, and her testimony is in the record, and I stated to the Court that I [466] would connect it up and show who took the picture, and I submit that it is now properly admissible.

Mr. Clausen: If the Court please, the witness just now stated that certain items were there and not shown in the picture and therefore the statement of counsel can't be correct.

Mr. Angell: Well, your Honor, a picture is a

(Testimony of Paul L. Kirk.)

picture of whatever the camera picked up. What he says is in that picture, the camera did not pick up some bedboards that protruded into the passageway back of where the picture shows. A picture never shows anything except what is in it, and that is all we are offering it for, what is in it.

The Court: Matter submitted?

Mr. Clausen: Yes, your Honor.

The Court: The objection is overruled.

Mr. Clerk: Plaintiff's Exhibit admitted and filed in evidence.

(Photograph previously marked for identification received in evidence and marked Plaintiff's Exhibit 7.)

Mr. Angell: Q. Now, Dr. Kirk, did you make an examination of the body at the morgue, as you said, or at the Chapel of the Chimes?

A. Yes, I examined the body on March 17th.

Q. Will you just state to the Court briefly the nature of that examination, the purpose?

A. The examination consisted primarily in observing the [467] entrance and exit wounds of the bullet. The front, the entrance wound in the chest, the position of it was noted and its condition noted.

Also, the exit wound, in the back, was examined to determine primarily the course of the bullet through the body, rather than for any other purpose.

Q. Did you ever see some pictures, photographs of the body, taken by the police—the Berkeley police—and pictures of the gun?

A. I recall seeing pictures taken in the base-

(Testimony of Paul L. Kirk.)

ment by the Berkeley police when they first visited the premises, I believe. I don't recall the details of them. I would recognize them if I saw them, I believe.

Q. I will show you Defendant's Exhibit F for identification and ask you if those are the photographs you saw or some similar to them.

A. Yes, these are either the photographs I saw or photographs of the scene, scenes in the same manner.

Q. Now, Dr. Kirk——.

Mr. Clausen, are you going to offer these photographs in evidence?

Mr. Clausen: I haven't seen them, counsel.

Mr. Angell: Oh, you put them in.

Mr. Clausen: Are these the ones that the police produced? [468]

Mr. Angell: They were attached to your Exhibit F that were produced by the police.

Mr. Clausen: The ones produced were these—was this envelope.

The Court: The officer had those.

Mr. Clausen: That is part of the police file?

Mr. Angell: That's correct.

Mr. Clausen: I have no objection to these going in, no.

The Court: Let them be admitted and marked.

Mr. Angell: Do you wish them to go in as our exhibit or as yours? You offered them for identification.

Mr. Clausen: Put them in as mine, certainly.

(Testimony of Paul L. Kirk.)

Mr. Angell: If you offer them, I will offer no objection.

Mr. Clausen: Fine.

The Court: They will be admitted and marked next in order.

The Clerk: Defendant's Exhibit J, admitted and filed in evidence.

(Group of photographs received in evidence and marked Defendant's Exhibit J.)

Mr. Angell: Q. Now, Dr. Kirk, did you ascertain how Mr. Houston was dressed at the time he was shot?

A. I made inquiries with regard to it, yes. I have only second-hand information, of course. Mrs. Houston informed me as to what he was wearing.

Q. What did she tell you he was wearing?

Mr. Clausen: Your Honor, that would be hearsay. I mean, there is no point——

The Court: The objection will be sustained.

Mr. Angell: Q. You examined Mr. Houston's body at the morgue. Was there any clothing on Mr. Houston?

A. Yes, he had a suit on at the time.

Q. Did you examine the gun with which Mr. Houston was shot? A. I did.

Q. And where did you obtain that gun?

A. I obtained it from Inspector Parker at the Berkeley Police Station on March the 15th, 1954.

Q. And I will show you Defendant's Exhibit B and ask you if you can identify that as the gun.

A. Yes, it is the same gun which I examined.

(Testimony of Paul L. Kirk.)

Q. Did you examine the floor where the gun was discharged? A. I did.

Q. And did you remove that portion of the flooring where the gun was discharged? A. I did.

Q. And did that piece of the floor—do you have any marks or evidence of a gun having been discharged there?

A. It had a single indentation, yes.

Q. Have you that piece of flooring here?

A. I do. [470]

Q. Well, you personally sawed this (indicating piece of wood) out of the basement where the—in the corner where on Plaintiff's Exhibit 1 is shown a hole cut in the floor? .

A. Yes, I personally sawed it out on March the 24th.

Mr. Angell: I will offer this into evidence.

Mr. Clausen: May I see it, please?

Mr. Angell: Offered in evidence as Plaintiff's next in order.

Mr. Clausen: I think we should remove the covering.

Mr. Angell: I was going to let the witness do that.

Mr. Clausen: We should remove the covering before it is offered, your Honor. And I would like to see it. The exhibit is covered and I will ask counsel to remove the cover.

Mr. Angell: Q. Did you put this covering on it? Let the record show this is a cellophane covering. Did you put that on, Dr. Kirk?

(Testimony of Paul L. Kirk.)

A. Yes, I put the cover on merely to preserve it, to preserve the board in the meantime, as a matter of precaution.

Q. Incidentally, was there anyone with you at the time you went out to make the inspection?

A. On one occasion there was, yes. Not on every occasion.

Q. Who was with you?

A. At the time I sawed out the board I was alone. On March 19th I was in company with Mr. Lowell W. Bradford.

Q. Who is Mr. Bradford? [471]

A. Mr. Bradford is the laboratory criminalist for the County of Santa Clara at the present time. He was formerly an associate of mine at the University as well.

Mr. Clausen: May I ask the witness a question on voir dire concerning this?

The Court: You may.

Mr. Clausen: Dr. Kirk, counsel has referred to this board and you have stated that you sawed it off. Now, was this a part of the board that was found directly under the hole in the ceiling?

A. It was found below the hole in the ceiling, not exactly direct; it was on a slight angle.

Q. How slight? A. I beg your pardon?

Q. I say, how slight an angle was it?

A. About six degrees.

Q. Six degrees—it was below the hole in the ceiling? A. That's correct, yes.

(Testimony of Paul L. Kirk.)

Q. Which part of this board was the floorboard that the people walked on, Dr. Kirk?

A. Well, all this was floorboard.

Q. I understand. A. I sawed it out.

Q. There are two sides, this side and that side.

A. This is the top. [472]

Q. In other words, this is the top?

A. That's correct. There are three indentations in there, I believe, two of which I placed there and one is the original. The original is the one in the center. I placed this one and this one.

Q. That's exactly what I was going to ask you, Dr. Kirk. I see on there there are two which span an inner slit. Now, did you measure this inner indentation? A. Yes.

Q. How deep is that?

A. About—it's a 33rd of an inch.

Mr. Angell: I submit, I brought this witness here. I would like to examine him to show what is on that board.

The Court: Give counsel an opportunity. You can cross examine.

Mr. Clausen: I wanted to find out, your Honor, to see if the witness did not——

Mr. Angell: If you will give me time, I will identify this thing and everything on it.

Mr. Clausen: Pardon.

Mr. Angell: I can't do it in one question.

Mr. Clausen: I am addressing my remarks to the Court.

If the Court please, what I am trying to find out

(Testimony of Paul L. Kirk.)

is that if the witness knew or saw this on the day that we are concerned with. [473]

The Court: Very well. Ask him the question.

Mr. Clausen: Yes.

Q. Do you understand, Dr. Kirk, my question? I would like to know if you know if this board was in this condition on the 22nd of February or whether you just found it this way when you went there.

A. Well, naturally I only saw it that way when I went there.

Mr. Clausen: All right.

A. On March the 14th.

Mr. Angell: Q. Now, you have handed me this board and I will ask you again, to be sure it is in the record, what date you cut that off of the floor.

A. I cut that out on March the 24th, 1954.

Q. The board has three marks on one side of the surface, is that correct?

A. That is correct.

Q. And were all those marks on that surface when you first saw the board?

A. No. At the time I first saw the board, only the one at the center was present and that was true until after the board was cut out. The other two were put there——

Q. Have you any kind of ink or anything where you can mark a circle around the first of those holes, and mark that K-1 on that board?

A. This is the original indentation (indicating).

Q. The original indentation.

(Testimony of Paul L. Kirk.)

A. (Witness indicating.) (Designating K-1.)

Q. Now, as to the second, pick either one of the other two indentations and call it the second—will you state when that was put in there, if you know?

A. This was made on the following day, March the 25th.

Q. And by whom? A. By me.

Q. And was anyone present when you made it?

A. Yes, my assistant was with me that day, though I made the indentations.

Q. Mark that K-2.

A. (Witness designating K-2.)

Q. Now, the third indentation, do you know who put that there? A. Yes, I did myself.

Q. Will you call that K-3?

A. (Witness designating K-2.)

Mr. Angell: I don't believe I offered this board, so I will now offer it for identification so that we will speak of it by number.

The Court: It may be admitted and marked next in order for identification.

The Clerk: Plaintiff's Exhibit 12 marked for identification. [475]

(Piece of flooring marked for identification Plaintiff's Exhibit 12.)

Mr. Angell: Q. Now, Dr. Kirk, referring to Plaintiff's Exhibit 12 for identification, will you state what K-1 is as shown on Plaintiff's Exhibit 12 for identification? Will you identify that mark?

A. K-1 is an indentation noted in the floor below the point at which there was a hole in the ceiling,

(Testimony of Paul L. Kirk.)

apparently a bullet hole, first noted on the first visit which I made to the Houston home, on March 14th, and studied more in detail later, on the 19th particularly.

Q. And will you state what K-2, that indentation is, if you know?

A. K-2 is an indentation which I placed in the same board, with the same rifle, by placing the board on the ground, holding the rifle in the same position as it must have been held in the basement, and firing it. It represents the recoil indentation of the stock in the board.

Q. And No. 3?

A. No. 3 was the duplicate of the same experiment. There were two rounds fired, in order to place recoil markings in the board.

Q. Was the board in on the floor in the basement or did you remove it, take it out where you could fire the gun?

A. I had to take it out where it could be fired. It was [476] actually on the ground along the roadside.

Q. And you then placed the stock of the gun on the board and discharged the bullet, is that correct?

A. That's correct.

Q. In each of those places?

A. That's correct.

Q. The indentations placed there were the results of those firings, is that correct?

A. That's correct, yes.

Q. Now, did you make an examination to deter-

(Testimony of Paul L. Kirk.)

mine where the spent bullet was, while you were there?

A. Yes. The bullet had entered the back of a chair in the living room and it was lodged under the upholstery toward the top of the back of the chair.

Q. And was that chair directly above the hole?

A. It was.

Q. The hole in the ceiling, for the record.

And did you remove that bullet?

A. No. Some effort was made to get it out, but it would have required removing the upholstery from the chair and eventually we left the bullet in place.

Q. Now, did you make any measurements to ascertain the direction of the bullet through the ceiling?

A. Yes. Measurements were made. A cleaning rod was inserted in the hole through the ceiling and a cord was placed [477] so as to be an extension of the cleaning rod so that the exact path of the bullet through the basement could be charted, with the exceptions only of any minor deflections which might have occurred in the passage through the body.

Q. And what deflection or angle did that go through the floor?

A. The bullet was inclined about six degrees to the north and about six and a half degrees, I believe, to the east.

Q. Now, did you ascertain by any means whether

(Testimony of Paul L. Kirk.)

the gun plus stock of the gun placed on the floor in the first of the impressions, the one that is marked K-1, whether a shell fired with a gun on that position would have gone through that hole in the ceiling?

A. Yes, the barrel of the gun was aligned with the cord which was an extension of the hole through the ceiling, and it was found that the heel of the butt came quite closely to the indentation in the floor in that position.

Q. Did you make casts of that impression that was there as shown on that Exhibit 12 for identification? A. Yes.

Q. Will you show that impression?

A. (Witness producing plaster cast.) I make a plaster cast of it. I took it in with wax at the time or with clay and reproduced in plaster.

Q. Will you produce that? [478]

A. (Handing counsel.)

Mr. Angell: The witness hands me a plaster cast.

Q. And you state that this is a plaster cast of the indentation made by the gun?

A. It is a positive replica. I mean, it was made from a negative clay impression.

Mr. Angell: I will offer this in evidence.

Mr. Clausen: May I see it?

Mr. Angell: Yes. Pardon me. (Handing counsel.)

Mr. Clausen: May I ask a question concerning this, your Honor?

The Court: You may.

Mr. Clausen: Do I understand, Dr. Kirk, that

(Testimony of Paul L. Kirk.)

this is an impression of the indentation which was in the center of that floorboard and which you marked K-1?

A. That is correct, yes, sir.

Mr. Clausen: And which was aligned underneath the hole in the ceiling, is that correct?

A. That is correct, yes, sir.

Mr. Clausen: And which in your opinion shows the recoil of the rifle?

A. That is correct, yes, sir.

Mr. Clausen: All right.

Mr. Angell: I will now offer this——. Well, first, your Honor, in the interest of order, I will offer the board [479] there, which was 12 for identification, I will offer that in evidence in connection with the witness's testimony.

The Court: It will be admitted and marked.

The Clerk: Plaintiff's Exhibit 12 admitted and filed in evidence.

(Piece of flooring received in evidence and marked Plaintiff's Exhibit 12.)

Mr. Angell: I will offer the plaster cast which the witness has testified is a replica of the impression of the board shown as K-1 on Plaintiff's Exhibit 12; offer it as Plaintiff's Exhibit 13.

Mr. Clausen: Have you offered the board, Mr. Angell?

Mr. Angell: Yes, it is Plaintiff's 12.

Mr. Clausen: The plaster cast is 13?

Mr. Angell: 13.

(Testimony of Paul L. Kirk.)

The Court: It will be received and marked next in order.

The Clerk: Plaintiff's Exhibit 13 in evidence.

(Plaster cast of impression K-1 received in evidence and marked Plaintiff's Exhibit 13.)

Mr. Angell: Q. Dr. Kirk, did you determine in your investigation the direction of the bullet, the path of the bullet through Mr. Houston's body?

A. Yes, as nearly as could be told. It is a little bit difficult, of course, with the body in a casket, but the body was raised and the entrance and exit wounds were measured up [480] as well as was possible with the source available.

Q. Will you state for the record what those measurements disclosed?

A. The bullet entered between the midline of the chest and the nipple. I have the measurements here (referring to notes). The entrance wound about three-quarters of an inch, about, above the nipple line, the line connecting the nipples, and about two and a half inches left of the center. That is from the sternum to the left.

The exit wound was somewhat lower, about two inches, as well as could be told, on the other side of the body. It could only be estimated—a little bit inaccurately—and its exit was four inches left of the center line—that is, of the spinal column.

The bullet actually coursed somewhat downward as it went through the body and to the left side.

Q. Do you know how tall a man Mr. Houston was?

(Testimony of Paul L. Kirk.)

A. Yes, he was quite a tall man. I don't remember measuring his exact length, but he was certainly over six feet.

Q. Does your record show the height of the area where the bullet was removed, which is Plaintiff's Exhibit 12 in evidence?

A. It is five feet ten and a half inches above the platform to the ceiling.

Q. Now, did you examine the gun—that's Defendant's Exhibit B—to determine under what conditions that gun could [481] be fired or discharged?

A. Yes, I examined it in connection with Mr. Bradford. The two of us worked together on it at the time. We tested various possible ways of firing it, and examined the loading mechanism, and so forth.

Q. Now will you state in your own words the result of your examination, as to the different methods by which that gun could be fired?

Mr. Clausen: Well, your Honor, we will object to that on the ground it would be evidence of test by a ballistics expert which anybody could perform. There is no showing here that these various tests involve the way the gun was discharged at the time of the shooting, except that the trigger would be pulled, and I have in mind, your Honor, that it would be pure rank speculation, for example, to try to conjecture or speculate on how a gun might be accidentally discharged, when there is no proof of any such accident. I have in mind, your Honor, that the clear facts here show exactly now that the wit-

(Testimony of Paul L. Kirk.)

ness is now testifying that the party, in view of the hole in the ceiling above, in view of the indentation of the gun on the floor, the victim must have been standing over in that way and the only possible method it could have been fired would have been by pulling the trigger, and your Honor will have in mind——

Mr. Angell: I object to that as a statement——

Mr. Clausen: Pardon me, counsel——

Mr. Angell: It is not supported by the evidence.

Mr. Clausen: Pardon me, counsel——

Mr. Angell: It is conjecture, it is an argument, it is not the proper objection.

Mr. Clausen: Your Honor, may I proceed?

Mr. Angell: And——

Mr. Clausen: Or shall I desist?

The Court: Give him a record on it, counsel. Proceed.

Mr. Clausen: And I have in mind a case, your Honor, in 43 California 2nd, in which there the court excluded ballistic expert testimony on somewhat similar grounds, in other words, calling in a ballistics expert to figure out how other methods could be used to discharge a firearm, when, as a matter of fact, the facts showed that it was suicide. 43 California 2nd, your Honor, the case is Long against some insurance company.

Mr. Angell: The case is obviously not in point. There is no evidence before this court that there was any suicide in this case.

The Court: (To Clerk:) Will you go get that case?

(Testimony of Paul L. Kirk.)

Mr. Angell: The question I am asking the witness is how this gun could be discharged.

The Court: You tell me what that spells out, your interpretation of it. [483]

Mr. Clausen: This is what it says in the syllabus:

“In an action seeking recovery on life policies on ground that death by shooting was result of accident, when insured tripped and fell as he ran out of the house with gun in his hand, it was not error to exclude testimony of plaintiffs’ ballistics expert as to tripping and fall tests—tests made by him to determine how he could produce wounds such as those inflicted on insured, especially where ballistic expert called by plaintiff had already testified that person holding pistol might fall so that it would strike the ground butt first and remain pointed toward him, such tests not being proper subject of expert testimony.”

In other words, in this case, your Honor, the insured ran out of the house, went out of the house with a pistol in his hand. What they were trying to do is have a ballistic expert show that it was accidental, when all the facts showed it was suicide. And in this particular case the court excluded then the expert ballistics testimony, and the Supreme Court of California here, decision of last year, held it was not error.

Mr. Angell: Now, if your Honor please, we are not trying to show here by this witness any test. What we are asking this witness is his opinion from the experimentations that he made, the differ-

(Testimony of Paul L. Kirk.)

ent manners in which this gun could be [484] discharged. That's the only question we are asking him.

The Court: Could be discharged?

Mr. Angell: Yes.

The Court: Now reframe your question so I may rule on it.

Mr. Angell: Q. Did you make any examination, Dr. Kirk, to determine the different methods by which this gun could be discharged?

A. Yes, I did.

Q. Will you state what your investigation examination showed?

Mr. Clausen: Your Honor, I object to it on the grounds just urged, in other words, all my objections just urged, that it would be conjecture, all the other grounds I just urged.

The Court: I will sustain the objection at this time.

Mr. Angell: Q. Dr. Kirk, did you discharge this gun by dropping it?

Mr. Clausen: Same objection, your Honor. Same objection, in other words, on all the grounds I just urged.

The Court: I will allow it subject to a motion to strike.

Mr. Clausen: May I make that motion to strike at any time before the end of the trial, your Honor?

The Court: Yes. [485]

Mr. Angell: Q. Will you answer the question?

A. I witnessed the discharge of this weapon by striking it when the hammer was down on the firing

(Testimony of Paul L. Kirk.)

pin. Mr. Bradford actually had the gun in his hand.

Q. And you dropped the gun and it discharged, is that correct?

Mr. Clausen: May I, so I won't be interrupting on this line of testimony, your Honor, may it be understood that my objection runs to this entire line as I have just embraced in my argument on this Long case?

The Court: The record will so show.

Mr. Angell: Q. Go right ahead and state what you saw.

A. Yes. The gun was discharged once by striking it on the butt on the floor when the hammer was on the firing pin. I believe that is the circumstance.

Q. Did that make an indentation on Plaintiff's Exhibit 12 in evidence.

A. No, no, that was not on Exhibit 12.

Q. Now, did you make the indentations on Plaintiff's Exhibit 12 by discharging the firearm?

A. Yes. The indentations were made by discharging the fully charged firearm directly by pressing the trigger of the cocked gun.

Mr. Clausen: What page, Mr. Reporter?

The Reporter: This is note 1 of today's proceedings. [486]

Mr. Angell: Q. That was with the butt of the gun placed on the ground, on the floor?

A. In making the discharges on the board, the board was placed on the ground.

The Court: Identify the board.

Mr. Angell: Beg your pardon?

(Testimony of Paul L. Kirk.)

The Court: Identify the board.

Mr. Angell: Q. That is the board here in evidence as Plaintiff's Exhibit 12, is that correct?

A. Yes, that's correct, Plaintiff's Exhibit 12.

Q. By placing the board on the ground, the gun on the board, and loading the gun and firing it, it made these indentations on Exhibit 12, K-2 and K-3, is that correct?

A. That's correct, yes.

Q. Now, did you discharge that gun by raising it up and dropping it?

A. Not at that time.

Q. Did you at another time?

A. At another time. It was discharged, as I stated, by Mr. Bradford in my presence with an unload cartridge, which was merely fired, the cap, so that it could be done indoors.

Q. What was done on that occasion?

A. The powder was removed from the cartridge. The cartridge was inserted. The hammer was placed on the firing pin. And the gun was struck to the floor butt downward. [487] There was one discharge, as I recall—not in my notes—one discharge produced that way.

Q. Now, as a result of your investigations with this gun, what in your opinion would be the different ways in which that gun could be discharged?

A. Well, certainly it could be fired in the normal manner, it could be cocked and the trigger could be pulled.

(Testimony of Paul L. Kirk.)

It could be fired if the hammer is on the firing pin, it could be fired by striking the butt.

It could perhaps, though I did not see this reproduced nor did I reproduce it, be fired by a snapping action between the half-cocked position and the fully down position; that is, there was always an indentation placed in the primer of this gun under those circumstances, but it was normally not deep enough to fire. It could happen, however.

The most probable ways, of course, are methods which would involve the cocking of a loaded gun and some mechanism whereby the trigger is pulled. That is, either by the finger intentionally or by other methods.

Q. Did you observe the way this mechanism of this gun worked (indicating Defendant's Exhibit B)?

A. Yes. I noted that the lever action on that gun is quite loose and it comes open very, very readily, so that it—that is something which very possibly could occur under any circumstances—the lever could come open and would then, if [488] it were closed, could load and cock the gun without even perhaps being known by the person doing it.

Q. And could a person, of Mr. Houston's height, bent over in a bending position to close that lever, could his—in that position—could his fingers touch the trigger?

A. Yes, they could. He could reach the trigger very nicely in the position in which he was.

Q. Now, as I understand it, and for the record,

(Testimony of Paul L. Kirk.)

we have the gun, the mechanism, the lever mechanism, which you say was loose and could have been open, was the mechanism or the part of the gun that covered the trigger, is that correct?

A. That is correct.

Q. And form the protective housing for the trigger?

A. It covers the trigger. It also is operative in loading the gun on the repeating action.

Q. So that a person removing that gun from the corner and turning around and stepping down, leaning over, as I understand, to close that, could have the hand come in contact with the trigger physically.

Mr. Clausen: Well, your Honor, we object to that as leading and suggestive, and also even going beyond speculative realms.

Mr. Angell: It calls for a measurement and that's all.

Q. Physically, he—his hand, would reach it, is that correct? [489]

A. That is correct, yes.

Q. Or he could intentionally have reached over and discharged it, is that correct?

A. That is true, yes.

Q. It could have been either way?

A. It could have been either way.

Q. In your opinion, Dr. Kirk, assuming a man six feet one and a half or two inches tall, and in that location where the hole was cut and where the gun was discharged, and assuming that he was bent over, as he would be required to be because of the

(Testimony of Paul L. Kirk.)

height of that ceiling, which was less than his height, and assuming that he had reached into the corner to get that gun and had turned around and reached over to close that mechanism, in your opinion could that mechanism have been—the gun have been discharged?

Mr. Clausen: Your Honor, we object to that as having been asked and answered, and again it is far beyond the realm of any evidence in this case. In other words, the only evidence in this case shows an intentional shooting of the trigger—pulling of the trigger.

Mr. Angell: There is no such evidence.

The Court: The objection will be overruled. I will allow it.

A. Yes, it is my opinion that could very definitely have happened. [490]

Mr. Angell: Q. And you testified it is your opinion also it could also be discharged by dropping it down?

A. It could have been discharged by dropping also.

Mr. Angell: Take the witness.

The Court: We will take the recess.

(Short recess taken.)

Mr. Angell: One more question before cross that I neglected to ask Dr. Kirk.

Q. Dr. Kirk, did you examine Mr. Houston's body with respect to powder burns?

A. Yes, I did.

Q. And did you find powder burns there or not?

(Testimony of Paul L. Kirk.)

A. Yes; there was a black area about one inch across around the bullet hole, with some powder scattered in a wider circle.

Q. From that can you determine from your knowledge of bullets fired against bodies the distance the gun was from the body at the time of firing?

A. The gun was—the muzzle of the gun was within one inch, but it was not in exact contact.

Cross Examination

Mr. Clausen: Q. Dr. Kirk, as I understand your testimony, when you arrived out there you made certain chest diagrams—not diagrams, but certain tests to determine the alignment of the gun with the bullet hole in the ceiling; is [491] that right? A. That is correct, yes, sir.

Q. And the way you figured it out, why, you brought down, I believe you said, a thread or a string was that, from the bullet hole in the ceiling?

A. Yes.

Q. Down to the place on the floor where this indentation was made which you say was made from recoil of the rifle; is that correct?

A. That's essentially correct, yes.

Q. And that came down to a point then that you have marked on this floorboard as K-1; is that right?

A. K-1 was not an exact extension of the string because of the offset in the butt of the rifle, of course. That is fairly close.

(Testimony of Paul L. Kirk.)

Q. An approximation?

A. Yes; it was an agreement with the position.

Q. And, as I understand your testimony, then, the gun would have rested on the floor of this approximate point of K-1 and have been directed to the heart area of Mr. Houston as he would be bending over by reason of his height, six feet something, two inches or so, with that gun pointing right at his heart area and the muzzle was at least right close to his body within an inch; isn't that correct?

A. Yes, that is correct. [492]

Q. And it is entirely possible for Mr. Houston to have intentionally pulled the trigger?

A. It is possible, yes.

Q. Yes. At the time that you made this examination and at the time you did this aligning, this indentation K-1—I am not speaking of some slight variance of five or six degrees, but, in any event, that was almost vertical to this hole in the ceiling; is that right?

A. It was in line with the bullet flight, yes.

Q. And almost vertical?

A. Just a little off vertical.

Q. Just slightly off vertical; isn't that correct?

A. That's correct.

Q. Isn't it also correct, that it being slightly off vertical and having in mind the height of Mr. Houston, that not only was he bending over—not only was he bending over parallel to the floor in this fashion with this directed up there against his heart, but by reason of his height and by reason of

(Testimony of Paul L. Kirk.)

the fact that his arm to come down to the trigger area—for his arm to come down to that area, his body would have to be bent over more than parallel; in other words, down in this fashion as I am bending now (demonstrating)?

A. Yes, his body would have been horizontal or a little bit more, yes.

Q. Well, it would have had to be more from the fact that [493] you had this string almost vertical and the fact that the bullet came out lower in the back than it went in in the front; isn't that correct?

A. Yes, that is correct; he had to be a little bit more than horizontal.

Q. Yes. Now, these indentations—I am speaking of all three, Dr. Kirk, that are on this Exhibit which has been marked Plaintiff's Exhibit 12—all these three indentations were made by the gun resting on the floorboard and the trigger pulled; isn't that right?

A. Well, the two that I made were, but I gave no testimony that the other one was.

Q. I see. In other words, none of these so far as you know were ever made by any gun falling or striking against the floor?

A. Not to the best of my knowledge, no.

Q. And so far as you are concerned the tests that you made—well, let me ask it in this way: So far as you are concerned the—what was that you stretched? Was that a string?

A. A string or a cord, yes.

(Testimony of Paul L. Kirk.)

Q. And who was present when you did that, Dr. Kirk?

A. The last time it was done, the time it was done more correctly, I did it in company with Mr. Bradford.

Q. Let me ask you this now: When that string came down from the ceiling, down to this place that has been marked K-1, [494] as you described, in your reconstruction of the shooting, if this was on the floor and if the gun was resting as you say it rested on this K-1 here from the shoulder pad, and if Mr. Houston was leaning over as you reconstruct it like this so that his arm would touch the trigger, would that string have passed through the bullet hole that you saw in the body where you reconstruct it in the body of Mr. Houston?

A. Yes, it would have passed essentially through the bullet hole.

Q. Exactly. This explains, then, where the gun was then resting as you brought down the string; it was in the center of the passageway, was it not?

A. Very close to the center of the passageway, yes.

Q. Now, you testified and I objected to the testimony concerning tests that you made. Isn't it true that despite the fact that you tried to fire that gun when it was loaded and when it was cocked by dropping it, you could not do it?

A. No, it was done once.

Q. I beg your pardon?

(Testimony of Paul L. Kirk.)

A. It discharged once by dropping it, by striking it on the floor.

Q. When it was cocked and loaded?

A. No, when the hammer——

Q. I asked you this——

A. Oh, cocked and loaded? I beg your pardon.

Q. Yes.

A. It did not discharge when it was cocked and loaded.

Q. And the only time that you could do it the other way, even though you tried, was to have it discharge once; is that right?

A. That is correct; that's all it was actually done.

Q. Yes. Then to get back to the questions I asked you first, Dr. Kirk: No matter how many times you tried to discharge that gun when it was loaded and when it was cocked by dropping it, jarring it, giving it a slap on the butt, on the side or in any other direction, you never could discharge it?

A. That is correct; it did not discharge when it was cocked.

Q. As a matter of fact, the gun itself has a reasonably strong trigger pull, hasn't it?

A. About five pounds, yes.

Q. So that answer to my question is "Yes"; isn't that correct?

A. Yes, that is correct. That is about a normal trigger pull for that kind of a rifle.

Mr. Clausen: I think that is all, your Honor.

(Testimony of Paul L. Kirk.)

Redirect Examination

Mr. Angell: Just one question, your Honor.

Q. So that the record will be perfectly clear on it, as [496] I understand it, you discharged the gun once by dropping it?

Mr. Clausen: Object to that as having been asked and answered, your Honor.

Mr. Angell: I know, but the record I don't think is clear.

The Court: I will give him a record on it. Objection overruled.

Mr. Angell: Q. You dropped it once when the gun was loaded and the trigger was not cocked; is that correct?

A. When the hammer was not cocked.

Q. That is correct; the hammer was not cocked.

A. It was against the firing pin.

Q. It was against the firing pin; the gun was loaded? A. That is correct.

Q. And the gun was dropped and it discharged once for you? A. That's right.

Mr. Angell: That is all.

Mr. Clausen: That is all, your Honor.

Mr. Angell: Call Mr. Bradford.

(Witness excused.)

LOWELL W. BRADFORD

called as a witness on behalf of the plaintiff; sworn.

The Court: Your full name?

A. Lowell W. Bradford.

The Court: Where do you reside? [497]

(Testimony of Lowell W. Bradford.)

A. At 21 North Carlyn in the City of Campbell.

The Court: And your business or occupation?

A. Criminologist.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. How long have you been engaged in the profession as a criminologist?

A. Since June of 1947.

Q. And in connection with your work have you been a witness as an expert on ballistics and guns, firearms?

A. Not ballistics but in connection with firearms for identification and investigation.

Q. What is your present occupation?

A. I am presently employed by the County of Santa Clara as the director of the laboratory of criminalistics.

Q. What does that job consist of?

A. That job consists of operating the laboratory, which is the official physical evidence laboratory for all of the police agencies in the County of Santa Clara.

Q. Does that work entail the examination of firearms and their discharge? A. It does, yes.

Q. And what experience did you have before you came to that job in the handling of firearms and experience with firearms and testing firearms?

A. Prior to that job in Santa Clara County?

Q. Yes.

A. Prior to that time I was employed by the

(Testimony of Lowell W. Bradford.)

California State Department of Justice in Sacramento as state criminologist in their technical laboratory.

Q. And in that connection did you examine guns and the discharge of guns?

A. I did, yes.

Q. And are you a graduate of any technical institution? A. I am.

Q. What?

A. The University of California at Berkeley.

Q. Have you taken any postgraduate work of any kind in it?

A. Yes; I took a year as a graduate student.

Q. And were you in the service?

A. I was.

Q. In the service did you have anything to do with firearms and ballistics? A. I did, yes.

Q. You were requested by me, on behalf of Mrs. Houston, were you not, to go over to the Houston home on Miller Avenue in Berkeley sometime last year? A. I was, yes.

Q. And what time was that?

A. On one occasion, on March 17th, at Dr. [499] Kirk's office and one occasion, on the 19th of March, at the home.

Q. And did you go up into the basement where this shot was fired? A. Yes.

Q. Which killed Mr. Houston. And did you make an examination of the condition of the basement at the time you went up? A. I did.

Q. Will you describe in your own words the

(Testimony of Lowell W. Bradford.)

condition of the area immediately adjoining the place where the bullet was discharged from the gun?

A. As I recall it, I went downstairs into the basement where there was a basement which had substantially two sections to it—one, an area in which I could stand up, being the part immediately adjacent to the entrance stairway, and then an area in the back end of the basement which had a raised platform on it and in which I could not stand erect and in which there was stored quite a few miscellaneous household items of furniture and other objects—very crowded.

Q. Now calling your attention to Plaintiff's Exhibit 1—will you step down here to the board, Mr. Bradford—and directing your attention to the mark on there C-2, I will ask you if your recollection is that that is about the location of any physical evidence there to show where the gun had been discharged. [500]

A. I would say that is about the location, yes.

Q. And do you recall the clearance space in there in the passageway, if any?

A. I didn't measure it, but, as I recall it, it was sufficiently close so that I had be very careful not to rub against anything in there; it was very crowded.

Q. And were there any protruding or projecting obstacles sticking out into that passageway from the sides? A. Yes, as I recall—

Mr. Clausen: Your Honor, I don't recall if I

(Testimony of Lowell W. Bradford.)

objected before, but I would certainly object on the ground that the witness obviously is there days after the event to which we are directing our attention.

The Court: That goes to the weight of the testimony, does it?

Mr. Clausen: That's right, your Honor.

A. As I recall, there were many objects protruding in the hallway—pieces of furniture principally.

Mr. Angell: Q. Did you notice a depression in the floor there, Mr. Bradford? A. I did, yes.

Q. And did you have the gun with you at that time to determine whether or not that depression fitted the butt of the gun?

A. We did have the gun at that time, yes. [501]

Q. Where had you gotten that gun?

A. I obtained that gun, I—I believe it was in Dr. Kirk's possession at the time.

Q. And would you recognize the gun if I showed it to you? A. I think I would, yes.

Q. I will hand you Defendant's Exhibit B and ask you if that is the gun.

A. Yes, that looks like the gun.

Q. Did you take down the numbers of the gun?

A. I believe I did. I don't seem to have it with me here at the present time.

The Court: Stipulated this is the gun, only to identify it for the purposes of the record?

Mr. Angell: Yes.

Mr. Clausen: Yes, your Honor.

(Testimony of Lowell W. Bradford.)

Mr. Angell: All right. I just wanted to clear up that there is no question but that is it.

Q. Did you make any tests at all in connection with Mr. Kirk or by yourself to determine the manner in which that gun could be discharged, how the gun could be fired?

Mr. Clausen: I just assume, your Honor, when my objection I said runs through the line, it includes any such testimony?

The Court: Let the record so show.

A. Yes, we made tests together. [502]

Mr. Angell: Q. And those tests were to determine how that gun could be fired?

A. Well, that was one of the purposes, yes.

Q. Did you also make any measurements to determine the course of the bullet up through the ceiling and upstairs? A. Yes.

Q. And what did you find the course of the bullet was?

A. Well, describing it briefly, the gun was placed in the area of the dent. The dent in the floor was used to locate the butt of the rifle. The hole in the ceiling of the basement was used as the other reference point, and a line was then constructed between the end of the gun, the muzzle end of the gun placed with its butt in the dent in the floor; a line was direct with a cord from the end of the muzzle to the hole in the ceiling. I then acted as model and placed my body over the gun, and of course the string was used at that time, placed at one side, to observe the alignment, and we observed

(Testimony of Lowell W. Bradford.)

that the alignment of the gun left the body in that position and with the hole was a consistent alignment, indicating that the bullet had passed through the body as it bent over the muzzle of the gun in that position.

Q. And did you measure the deflection of the bullet from straight up, or perpendicular, what deflection it was as it went through the ceiling?

A. I made no angular measurement, no. [503]

Q. You made no angular measurement. Did you make some tests to determine in what manner that gun could be discharged?

A. I made various tests, yes.

Q. And will you state what the results of your tests were?

A. The first test that I made was a test on the trigger pull, using a trigger pull gauge. I found that the gun did not always discharge at the same trigger pull, and the range of variation was from four and a half to five pounds. It would always fire with five pounds pull; sometimes it required as little as four and a half pounds. The second test was to determine the effectiveness of the safety mechanism, if any. And there is only one safety mechanism on this gun, which is known as the half-cocked position. Shall I demonstrate that?

Q. Yes. Do you want the gun?

A. Yes, please. The firing pin has three possible positions. One is when it is fully retracted in the firing position; the second when it is let down carefully in what is known as the half-cocked position.

(Testimony of Lowell W. Bradford.)

In that position the firing pin does not lie on the—the hammer does not lie on the firing pin; there is a space between. The third position is the position following firing when the hammer is directly on the pin. And that position can also be reached by quickly letting down the hammer—as the trigger is pulled, letting down the hammer with the thumb past the half-cocked position. This half-cocked position is what I referred to as the safety [504] position. It appears to be in good order, that being the only safety mechanism.

The other tests that I made had to do with being able to dislodge the hammer from the cocked position by striking first on the left side with a hammer, then on the right side, then on the bottom, then on the top, and then by jarring the butt. And I found that the hammer in the fully cocked position would not dislodge from any one of those positions with a blow.

The next test was to place in the chamber of the barrel a round of ammunition from which had been removed the bullet and the powder, the detonating cap or primer still being in the cartridge case. The hammer was let down by using the combination of releasing the trigger with the thumb on the hammer, was let down past the half-cocked position, so that the hammer rested upon the firing pin. At that point the hammer spur was struck a light blow with a hammer and the round in the barrel discharged.

The next test that was made was to place a round of ammunition in the chamber, again with the bul-

(Testimony of Lowell W. Bradford.)

let and powder removed, with the primer cap still intact in the cartridge. The hammer was again let down past the half-cocked position to the firing pin, and the rifle was dropped on the floor butt first in this manner (illustrating). And upon one of those occasions the round discharged in the barrel.

I think that is the extent of the tests except that I [505] examined it generally for mechanical condition and I found that there was a tendency for the latch mechanism of the lever to open rather easily if any vibration or jar was applied to the gun, so that it was easy to place it in a position to open.

Q. So that if that gun were pulled out of position with anything and dropped, it would drop close to that position, is that correct?

A. There was a tendency toward that.

Q. And anyone moving over to close it would be leaning over the gun in a stooping position; is that correct?

A. It would be necessary to stoop to reach it, yes.

Q. Then, as I understand your testimony, Mr. Bradford, this gun could be discharged either accidentally or intentionally; is that correct?

A. Yes, that is correct.

Mr. Angell: That is all.

Cross Examination

Mr. Clausen: Q. May I ask you, Mr. Bradford, a question? I am referring, of course, to the time you went there—and I believe that was about the middle of March; is that correct?

(Testimony of Lowell W. Bradford.)

A. I stated it was March the 19th.

Q. All right. When you went there and you examined the basement down there you saw plenty of things stored, but you wouldn't say it was cluttered, by any means, would you? [506]

A. No, I would say it was as neatly done as possible for the amount of material in that space.

Q. And there was a passageway leading over to the point where you saw the indentation in the floor; is that correct?

A. There was a place by which one could walk, yes.

Q. Now, as I understand it, you took and you also examined X-rays of the bullet hole through the body; is that correct? A. That is correct.

Q. Now, you were here in the courtroom when I was asking Dr. Kirk some questions about the path of the bullet? A. Yes.

Q. Through the body. A. That is correct.

Q. Without going through the procedure, your answers I assume would be the same on that?

A. Yes, it would.

Q. Now, the tests that you made, the tests that you just indicated that you made with that gun to see about the gun being fired, actually you didn't and Dr. Kirk didn't use real bullets, did you?

A. By "bullets" I am not sure that we both mean the same thing.

Q. Well, all right. Bullets that would be the kind of a bullet that killed the deceased. You didn't use those, did you? [507]

(Testimony of Lowell W. Bradford.)

A. I am still not sure whether we have the nomenclature.

Q. Well, all right. I will ask you this: The kind of bullets you used you couldn't kill anybody with, could you?

A. We started out with the type that would kill people, but we removed the projectile part, which I referred to as the bullet, and we removed also the powder.

Q. Well, that isn't what I asked you, Mr. Bradford. I asked you the simple question: When you made the test with the gun that you have now demonstrated to the Court this morning, you didn't use bullets of the kind that killed Mr. Houston, did you?

A. We did not use any bullets.

Mr. Clausen: That is all.

Redirect Examination

Mr. Angell: Q. Where did you get the shells . that you used in the gun for that purpose, Mr. Bradford?

A. They were two rounds of .30-.30 ammunition, which, as I recall, were removed from a paper bag in the basement of the Houston residence.

Q. And those were the caliber bullets that fitted this gun; is that correct?

A. That is correct.

Q. The gun being Defendant's Exhibit B. And what you did was to take these caliber bullets out of that paper bag—or take the shells out of the

(Testimony of Lowell W. Bradford.)

paper bag, and remove the bullet; [508] is that correct? A. That is correct.

Q. The lead of the bullet?

A. The projectiles were removed, yes.

Q. By the way, what kind of bullets did you notice in that paper bag, or shells?

A. The cartridges that I recall were that there were some 30-06 rounds. There were—I should say cartridges. There were some shotgun cartridges and there were also some .30-.30 cartridges. That's all I remember at the present time.

Q. And would you have any recollection of about how many bullets there were in there?

A. I can't recall except it was a bag approximately six inches in diameter and I would judge it had from four to six inches of depth with cartridges in it.

Q. Calling your attention to the powder burns on the body, when you examined the body did you see the powder burns?

A. I did not examine the body myself.

Q. You did not? A. No.

Q. Assuming that there were powder burns on the body, would that indicate anything to you? Let me withdraw that. Assuming that there were powder burns in the area of the wound where the bullet entered the chest, would that indicate to you, or from that could you determine how far away from [509] the body the gun was when it was discharged or whether it was on the body?

A. Our determination of the distance from the

(Testimony of Lowell W. Bradford.)

muzzle of the gun to the target can be made in some cases where there are powder burns, depending upon what one knows about the burns and their size.

Q. If a gun is right against the body, would there be any powder burns?

A. There usually is no burn at all; the only thing that is made in that case is a dark ring around the edge of the hole when the bullet enters.

Q. And if there are powder burns of a substantial amount, the gun muzzle would be in what position?

A. The muzzle would have to be removed from the skin sufficiently so that the gases which are emitted from the gun would then strike the outer skin.

Mr. Angell: I think that is all.

Mr. Clausen: No questions.

Mr. Angell: May Mr. Bradford be excused and Mr. Kirk?

Mr. Clausen: Yes, your Honor.

The Court: They may be excused.

Mr. Angell: Just a minute, Miss Hoffman. There is one gentleman here who is in a hurry to get away—Mr. Robinson.

WILLIAM G. ROBINSON

called as a witness on behalf of the Plaintiff; sworn. [510]

The Court: Your full name, please?

A. William G. Robinson.

(Testimony of William G. Robinson.)

The Court: Your business or occupation?

A. I am a certified public accountant.

Direct Examination

Mr. Angell: Q. Where are your offices, Mr. Robinson?

A. 200 Bush Street, San Francisco.

Q. And did you have occasion to make up a statement showing the net worth or the assets and liabilities of Mr. Houston as of February 22, 1954?

A. Yes, I did.

Q. Just to hurry it along, did you prepare the inheritance tax affidavits and the community property affidavits and the federal estate tax returns?

A. Yes, that is correct.

Q. And you also prepared, did you not, a statement of financial condition of William M. and Charlotte S. Houston as of February 22, 1954?

A. Yes, I did.

Q. I will show you Plaintiff's Exhibit 8 for identification and ask you if that is the statement you prepared.

A. Yes. That appears to be the statement.

Q. Now, with the information contained in there—is that the information you had obtained for the purpose of filing the inheritance tax affidavit and the federal estate tax return? [511]

A. Yes.

Q. And the community property affidavit?

A. Yes.

(Testimony of William G. Robinson.)

Q. And you prepared those from the data which you had obtained; is that correct? A. Yes.

Q. And where did you obtain that data?

A. That data was obtained from records submitted to me by the law firm of Angell & Adams, who were the attorneys for the estate of Mr. William Houston.

Q. You show, do you not, in this return or statement the values put on real estate in the estate?

A. Yes, I do. Those were the valuations arrived at by the inheritance tax appraiser in the estate of William M. Houston.

Q. And all of those figures appearing in this statement were the figures submitted for the official purpose of the estate to determine the inheritance taxes, were they not?

A. With the exception — with the exceptions which are noted in the statement and its supporting schedule. In other words, for example, with regard to life insurance, it is presented at its estimated cash surrender value, which of course is not a figure that enters into the inheritance tax affidavit.

Q. As to determining that cash surrender value, where did [512] you get the cash surrender value for that figure?

A. Those are obtained from tables which are a part of the insurance policies.

Q. And you saw those policies?

A. I did not in every case see the policies, no. Some of the information I got by correspondence

(Testimony of William G. Robinson.)

with the Canadian—with an official of the Canadian Bank of Commerce, which had made loans secured by some of the policies, and to a certain extent I relied on their records, which had been obtained by reference to the policies themselves.

Q. The policies were located at the bank, were they not? A. Yes, they were.

Q. And in their possession, and the bank gave you the information from the policies in its possession? A. That is correct.

Q. And so far as known to you, the Inheritance Tax Division of the State of California and the Federal Estate Tax Division tax returns have been accepted, at least to this point, by those bodies, have they?

A. Yes, apparently, to the best of my knowledge.

Mr. Angell: I will now offer this statement in evidence as Plaintiff's Exhibit 8.

Mr. Clausen: Just a moment. Counsel, may I see that? I just want to make sure, Mr. Robinson, this document you have just identified and held in your hand, Plaintiff's 8, does not purport—I will ask the question this way: You [513] didn't prepare this with any audit? This is no audit, is it?

A. You are correct; there was no audit made.

Q. And, as a matter of fact, you didn't verify the records?

A. To the extent that the entire tax affidavit I submitted, for example, as a public record, I would consider that verification.

(Testimony of William G. Robinson.)

Q. Well——

A. It would be a—it would not be a correct statement to say that none of this information was verified, no.

Q. Then when this statement under your letterhead states here: “This statement was prepared from the records of William M. Houston and Charlotte S. Houston and from data compiled for the purpose of probating the estate of William M. Houston, deceased, without audit or other verification of such records or data,” that is incorrect?

A. I am not sure. What is incorrect?

Q. I am asking you—you just said it was not correct to state that it was not verified.

A. I said it was not correct to state it was prepared without any verification. However, that statement there doesn’t say it in exactly that way.

Q. Well, the statement I just read——

A. It states that every item involved was not the subject of an independent verification.

Q. Well, would you find the word “item” in there for me? [514] This is on your letterhead?

A. That is correct.

Q. Is the word “item” in there?

A. No; it is correct that, except to the extent that this information was verified by reference to the data submitted in connection with the inheritance tax affidavit, there was no verification other than that. I see what you are—that is what it states.

Q. Mr. Robinson, all I want to do is to find out what is the situation. A. Yes.

(Testimony of William G. Robinson.)

Q. I am reading your own typing here. It says here: "The statement was prepared from the records of William M. and Charlotte S. Houston and from data compiled for the purpose of probating the estate of William M. Houston, deceased, without audit or other verification of such records or data." A. I say that——

Q. Pardon me.

A. That statement is correct as it stands there, and the words "other verification" means that the extent of the verification was limited to the examination of the records entering into the probating of the estate, the preparation of the inheritance tax affidavit, the preparation of the federal estate tax return, and the preparation of related income tax returns. [515]

Q. Is there any reason, Mr. Robinson, why you did not sign this?

A. I am afraid that was simply an oversight.

Mr. Angell: Maybe this is a copy.

Mr. Clausen: No, that is the original, unsigned.

Mr. Angell: Yes, this is. Have you any objection to Mr. Robinson signing it now?

Mr. Clausen: I have no objection. I am just trying to find out.

Mr. Angell: Yes, I am sorry that I overlooked it. I would prefer that it be signed. You did write this letter, didn't you?

A. I did write that letter, and how it didn't get signed was an error in the office.

(Testimony of William G. Robinson.)

Q. Have you any objection to signing it here?
Have you got a pen?

A. No, I haven't.

Q. Suppose I gave you one. That certification which you are signing, Mr. Robinson, is the usual certification of a certified public accountant where they haven't actually audited the accounts and verified them by letters to the people who are shown as debtors and the like?

A. That and other procedures considered necessary for the conduct of an audit.

Q. The claims shown in here against the estate are for [516] the most part claims filed against the estate and paid; is that correct?

A. That is correct.

Mr. Angell: I now offer this in evidence.

The Court: It will be admitted and marked.

The Clerk: Plaintiff's Exhibit 8 admitted and filed in evidence.

(Statement prepared by William G. Robinson was admitted in evidence and marked Plaintiff's Exhibit 8.)

ELLEN MAY HOFFMAN

called as a witness on behalf of the plaintiff; sworn.

The Court: Your name, please?

A. Ellen May Hoffman.

The Court: Where do you live?

A. 1667 Thirty-First Avenue, San Francisco.

The Court: Your business or occupation?

A. I am a secretary.

(Testimony of Ellen May Hoffman.)

The Court: Take the witness.

Direct Examination

Mr. Angell: I am trying to find my notes here, your Honor. They are a little bit extensive.

Q. Miss Hoffman, what is your business or occupation?

A. I am a secretary—executive secretary.

Q. And to whom are you secretary now?

A. To the United States manager of the New Zealand Insurance [517] Company, Mr. Richard B. Masters.

Q. He is the gentleman who has testified here before, is he? A. Yes, he is.

Q. Were you ever secretary for Mr. Houston when he occupied that position?

A. Yes, I was.

Q. How long were you a secretary of Mr. Houston?

A. I had been secretary for Mr. Houston a little more than ten years, since about April, 1943.

Q. And at the time you went to work for Mr. Houston as a secretary, was that with the New Zealand Insurance Company?

A. No, it was not.

Q. Who was that with?

A. That was with the Fire Association of Philadelphia.

Q. And ever since that time you were continuously secretary to Mr. Houston? A. Yes.

Q. To the time of his death, is that right?

(Testimony of Ellen May Hoffman.)

A. That is correct.

Q. Were you what would be defined as a confidential secretary?

A. Yes, I am personal confidential secretary and take care of all confidential matters of the company as well as the manager. [518]

Q. And mail coming in to Mr. Houston marked "Confidential" and "Personal," would it be part of your job under Mr. Houston's standing directions with you to open that mail and see what it was?

A. I opened everything regardless of how it was marked.

Q. And that would be whether it was marked "Personal" or "Confidential" or not?

A. Yes; it didn't make any difference; I opened every envelope that was addressed to him.

Q. Directing your attention to the Friday before Mr. Houston's death, which would have been Friday, February the 20th; is that correct?

A. The 19th.

Q. 19th. Did you work on that day?

A. Yes, I did.

Q. All day?

A. All day and up until about eight-thirty that night.

Q. And did Mr. Houston work on that day?

A. Yes, he did.

Q. And what time did Mr. Houston leave?

A. He left about six o'clock.

Q. And did you observe Mr. Houston's manner and demeanor on that day?

(Testimony of Ellen May Hoffman.)

A. Yes. He was the same as he had been before, his usual, jovial self. [519]

Q. Did you notice any depression or melancholia? A. No.

Q. Or worry? A. No.

Q. Did you notice any difference in his actions or manner than he ever had?

A. No, there wasn't anything different about his manner that day than any other day.

Q. How would you describe Mr. Houston in his attitude and disposition around the office, just generally, Miss Hoffman?

A. Well, he was a very energetic man. He had a job to do and he felt that he must do it, and he did it very well; and he was very considerate of other people and I would say that he was a man with a heart.

Q. Would you describe him as a nervous person, or a man who took his work more or less in stride without too much worry or show?

A. No; he did things as he came to them and he didn't worry about them before he came to them at all. I mean he took one job and did his work in stride.

Q. On the afternoon of Friday, the 19th of February, 1954, prior to Mr. Houston leaving his office, did Mr. Houston have any discussion with you as to the work for the following week?

A. Yes; after five o'clock he was sitting in front of my desk and we were talking about, oh, many things, but he did [520] say that he wanted to

(Testimony of Ellen May Hoffman.)

write a letter to the head office and he wanted to—in that letter he wanted to put forth his ideas for the following year, for the year 1954. And so I told him that if he wanted to write that letter, that since I was coming in to work the next day anyway, but if he wanted to come over that I would write the letter and we could get it off in the mail because we have to consider the airmail service to New Zealand. It doesn't go every day like it does here. He said no, that it wasn't that important; that we would write it Tuesday. And then of course that next week also the annual statement on all the forms that must go with that statement as well as the letters had to be signed and had to be in the mail, and that is what we were going to do.

Q. And he was going to write the home office to lay out the program for business or a suggested program for 1954? A. That is right.

Q. Is that correct? A. That is correct.

Mr. Angell: If your Honor please, I have an attorney here who gives me a note that he is very busy. He will be a very short witness and he asked me if he might be called now because he has an important engagement back at his office this afternoon. May I withdraw this witness and put this gentleman on?

Mr. Clausen: So far as I am concerned, it is certainly satisfactory with me, your Honor. [521]

The Court: You may step down.

Mr. Angell: Mr. Levit.

BERT W. LEVIT

called as a witness for the Plaintiff; sworn.

The Court: Proceed.

Direct Examination

Mr. Angell: Q. Mr. Levit, what is your business or profession?

A. I am a lawyer.

Q. And where do you reside?

A. I live at 901 California Street, San Francisco.

Q. How long have you been admitted to the bar of California?

A. I was admitted to the California bar in 1925.

Q. And have you practiced your profession here in all the courts, the state and federal courts, since that time?

A. With the exception of one year which I spent in Washington as a special assistant to the United States Attorney General.

Q. Did you know Mr. William Houston in his lifetime? A. I did.

Q. And in what capacity did you know him?

A. Well, I knew him in a friendly way and I also knew him as a client and as an official of organizations that were also clients of mine.

Q. You do considerable insurance practice, do you not?

A. We have a general practice, but we do a good deal of [522] insurance work, yes.

Q. Have you over the past several years seen Mr. Houston both socially and in a business way?

(Testimony of Bert W. Levit.)

A. Yes. I think I should say that when I say "socially" I don't mean that we ever exchanges visits personally in our homes, or anything of that kind, but the fire insurance people do gather for lunch not infrequently at certain places, certain clubs, and also they occasionally have dinners to honor retiring members, and also they have annual meetings of their associations which are not infrequently held out of San Francisco and which constitute as much social affairs in a way as they do business affairs.

Q. In other words, your social activities with him were in connection with business primarily; is that correct? A. That is correct, yes.

Q. And then you saw him in your office and in his office?

A. I can't recall whether Mr. Houston was ever in my office, although I think he was on more than one occasion. However, I was in his office on several occasions when we were handling matters for his company.

Q. Over what period of time had you known Mr. Houston prior to his death?

A. Well, I don't remember exactly the year that he came here to San Francisco, but he was, I know, the *manner* of the Fire Association of Philadelphia, and I am quite sure that I made [523] his acquaintance very shortly after he arrived.

Q. Will you in your own words state for the Court and the record what you observed as to Mr. Houston's demeanor and attitude as you saw him

(Testimony of Bert W. Levit.)

through those years, as to whether he was a happy person or an unhappy person?

Mr. Clausen: Your Honor, my objection to this same kind of testimony has been made before. I won't remake it if it is understood it runs to this line.

The Court: Well, I allowed both sides considerable latitude in that respect to accommodate the case.

Mr. Clausen: All right, your Honor. May it be understood my objection runs to this line?

The Court: Let the record so show.

A. Well, I would say that as between the two classifications of being a happy or an unhappy person, he always impressed me as being a happy person.

Mr. Angell: Q. Did you ever see Mr. Houston when you would call him depressed, melancholy or in a bad mental state?

A. No, sir, I never did.

Q. And would you describe Mr. Houston as an extrovert or an introvert?

A. Well, I wouldn't say that he was an extremist on either side. I didn't consider—there is nothing that I could put my finger on to say that I would consider him either one or the other. [524]

Q. But when he was with the insurance group in these insurance company activities, did he seem to enjoy taking part in them?

A. Oh, very definitely. He participated in the normal business gatherings and in the normal social

(Testimony of Bert W. Levit.)

gatherings at these meetings, and so far as I was able to observe, no differently from anyone else.

Q. Did you ever hear Mr. Houston——

A. He was friendly, I would say that. He was certainly a very friendly person to those with whom he came in contact.

Q. Did you ever hear Mr. Houston express any desire or intent to commit suicide?

A. Never.

Q. And did you observe Mr. Houston's drinking habits at the time he was with you and that you saw him?

A. Well, I can't—I can't say specifically that I remember ever seeing him take a particular drink. I certainly would have observed it had he not taken a drink when other people were drinking, because I have seen him at these meetings when people were having a few drinks and I observed no difference between Mr. Houston's habits in that regard and the others. And I observed that these people were all quite sober people. In other words, I never saw Mr. Houston at any time under the influence of liquor in any degree.

Mr. Angell: That's all. [525]

Cross-Examination

Mr. Clausen: Q. Just one question, Mr. Levit. Did you ever journey with Mr. Houston to Lakeview, Oregon?

A. Did I ever go with him?

(Testimony of Bert W. Levit.)

Q. Yes, sir.

A. No, sir, I didn't.

Mr. Clausen: That's all.

The Witness: Thank you very much, your Honor.

The Court: It is time for adjournment now. We will take an adjournment until two.

(Thereupon an adjournment was taken to 2:00 o'clock p.m. of the same day. [526])

ELLEN MAY HOFFMAN

recalled as a witness for the Plaintiff; previously sworn.

Direct Examination—(Continued)

Mr. Angell: Q. On the Friday before Mr. Houston's death, you have testified that you worked all that day and so did Mr. Houston, and I will ask you if on that day you observed Mr. Houston's demeanor and manner.

A. Yes, I did.

Q. Was it pleasant or unpleasant? Did it seem as though he was worried or melancholy or depressed in any way?

A. No, he was himself. He was very pleasant, very jovial.

Q. Do you know of any appointments or activities that Mr. Houston was planning for the following week?

A. Well, we were going to write that letter that I have mentioned, and we were going to continue with the signing of the annual statements and all the papers because of the fact that there is a dead-

(Testimony of Ellen May Hoffman.)

line to meet, and if the companies do not meet the deadline they are going to get into difficulty; so those had to be filed before the end of the week, or in the mail.

Q. Did he have an appointment with anyone that you know of for a meeting?

A. Well, he was—yes, he was going—on Wednesday he [527] was going to meet a gentleman that was coming down from Oregon and was going to work with the southern Oregon ranches. And I don't think the other gentleman in southern Oregon, he never knew the man, so he was going to introduce him.

Q. Now, on the annual report—did you get out any of that annual report?

A. Yes, I fill out all the certificates—applications for certificates of authority. In other words, that is the company license portion. I fill in those forms myself.

Q. Did you assist Mr. Houston in getting out the forms and annual reports each year in the part that he had to do? A. Yes, I did.

Q. And did you observe anything different in connection with the annual report this year, in the one being prepared at the time of his death, and any of the years before?

A. He felt that—in comparing the figures that he would receive monthly, he felt that the report was not bringing enough commissions into the New Zealand Insurance Company, and so he went up to

(Testimony of Ellen May Hoffman.)

the accounting department to find out why, and he looked over the statements and discovered the error, so they had to send about six pages out to the photographer's to be redone, and he was a little annoyed at the accounting department.

Q. Was he depressed about it?

A. No. [528]

Q. Nervous? A. No.

Q. Was it an error in the accounting division or controlling division?

A. It was an accounting error.

Q. Was it the common habit or part of his duties, Miss Hoffman, to make these adjustments and see that the report was in proper shape?

A. Yes, because he is the official who signs the annual statement form itself as well as the tax form and he is the individual held accountable by the state.

Q. I think you testified that you offered to work on the Saturday following to get out anything he needed; is that right? A. Yes, that is true.

Q. At any time, say the last several weeks before Mr. Houston's death, did you notice any particular nervousness or any depressive or morose attitude or feeling? A. Oh, no, no.

Q. Anything different than you always saw in Mr. Houston?

A. No, he was as pleasant as usual, was cordial to everyone.

(Testimony of Ellen May Hoffman.)

Q. Did Mr. Houston ever complain to you or state that he had any financial difficulties?

A. No, no.

Q. Or any other kind of difficulties?

A. No. [529]

Q. Did he ever make any statement that he would do away with himself, or commit suicide, or that he felt as though he wanted to, or anything of that kind?

A. I never heard him make such a statement.

Q. Do you know whether Mr. Houston was offered the presidency of any company, insurance company, shortly before his death?

A. Yes, he was.

Q. What company was that?

A. Fire Association of Philadelphia.

Q. And what did he say?

A. He said that he was refusing the presidency because he felt the Pacific Coast was the best place to live and that he had made a commitment to the New Zealand Insurance Company that he intended to keep.

Q. Were you in the office when directors and officers of the New Zealand Insurance Company would come from New Zealand and meet here or be here with Mr. Houston? A. Yes.

Q. Did you have occasion to be present when they were in discussions or observe any activities together?

A. Yes, because I met all of them.

(Testimony of Ellen May Hoffman.)

Q. And what was their attitude as you observed it toward Mr. Houston?

A. Oh, they were always very cordial, very friendly. In fact, they didn't come here in an actual company capacity. The [530] only one who came here in an official capacity was the general manager; the others came here merely passing through the United States.

Q. Under the form of corporation which the New Zealand Insurance Company was formed, the managing director is such traveling wherever he is in the world; isn't that true?

A. That is correct.

Q. And did you ever notice any shells of any kind in Mr. Houston's desk?

A. Yes, he kept them in the bottom of one of the drawers where he kept the blank checks.

Q. You had a chance to observe Mr. Houston's drinking habits? A. Yes.

Q. Where would you be on occasions?

A. Oh, well, there were various social occasions, such as Christmas parties or maybe company banquets, something like that.

Q. And at such times as you ever saw Mr. Houston drink, would you state in your own words how many would you say he took?

A. Oh, he might have one or two drinks, maybe three.

Q. Did you ever see him intoxicated?

A. No, I have never seen him intoxicated and

(Testimony of Ellen May Hoffman.)

never seen him to the point he couldn't handle himself.

Q. Did you ever see him when he couldn't walk straight or talk straight? [531]

A. No, I never did see him falter in his walk or hear him falter in his speech.

Q. Do you know whether Mr. Houston was planning to take a trip to Honolulu?

A. Yes, he was planning to go to Honolulu on the Lurline and he was taking Mrs. Houston with him.

Q. I will show you a letter dated December 10th, 1953, or a carbon copy of one, and I will ask you if you wrote that letter—the original of that letter, of that carbon.

A. Yes, I wrote that letter.

Q. And did you there make reservations for a trip on May 24th on the Lurline for Mr. and Mrs. Houston to go to Honolulu?

A. I had made the reservations earlier, but this was the deposit for the reservations.

Q. You had made the reservations already?

A. That is correct.

Q. And did those reservations remain in effect until after Mr. Houston's death?

A. Yes, until February 24th when I called.

Q. And then did you get the refund from——

A. Yes, and we received a refund on March 5th, 1954.

Q. And will you for the record explain these pencil and ink memos here which do not constitute

(Testimony of Ellen May Hoffman.)

part of the record, just so it will be clear in the record?

A. Well, I had a marking up here on the upper right-hand [532] corner to attach to the suspense file, because this letter being written on December 10th and enclosing \$50.00 deposit toward another file, and I wanted to be sure that it would come up in suspense so we would be sure to pick up the tickets, and I had it marked first for 2/10, and then I had changed it to March 10th, or 3/10, as I have it here.

Q. That was followup to get the ticket?

A. That was a followup to be sure to get the tickets. Then I had this marked as "General file," which meant it was going to the regular general file. And then I have explained before what I did on February 24th, 1954, and a refund received March 5th, 1954. And I don't know what this other pencil mark on here means, but it is my writing. It looks like "NAG" or something.

Mr. Angell: I ask that this go into evidence as Plaintiff's next in order.

The Court: Let it be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 14.

(Letter dated December 10, 1953, received in evidence and marked Plaintiff's Exhibit 14.)

Mr. Angell: I think that is all.

(Testimony of Ellen May Hoffman.)

Cross-Examination

Mr. Clausen: Q. Miss Hoffman, did you ever observe Mr. Houston at Lakeview, Oregon?

A. No, I did not go up to Lakeview. [533]

Mr. Clausen: That is all.

Mr. Angell: No further questions.

Mr. Utley.

HARRY A. UTLEY

called as a witness on behalf of the Plaintiff; sworn.

The Court: Your full name, please?

A. Harry A. Utley.

The Court: Spell your last name.

A. U-t-l-e-y.

The Court: Where do you reside, Mr. Utley?

A. Lakeview, Oregon.

The Court: Your business or occupation?

A. Yes. I am in the real estate, farming and timber business.

The Court: How long have you been so engaged?

A. About fifty years.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. How long have you lived in Lakeview, Oregon? A. Since 1908.

Q. How old are you now, Mr. Utley?

A. Past 72.

Q. Did you raise a family in Lakeview?

A. Yes. [534]

Q. And your home is there?

A. That's right.

(Testimony of Harry A. Utley.)

Q. And where is your home located in Lakeview?

A. It is in Goldmore Terrace, about a mile and a half north of Lakeview in a subdivision.

Q. And will you just tell briefly, what kind of a home is that, Mr. Utley? What is it built of? Describe the home.

A. Well, it is a large rock home, heated with a natural hot water from a geyser and it has fifteen rooms. It's a very lovely home.

Q. Do you have a projection room there to show pictures and to entertain in?

A. Yes, I have a big party room in the basement.

Q. And during the course of years have you entertained people coming to Lakeview?

A. Lots of hunters and fishermen.

Q. Through all the years?

A. Through all the years.

Q. Will you just describe the location of that home with respect to Goose Lake and the farms that you are interested in down in the valley there?

A. Well, it is rather up on a hill and overlooks our Hunters Hot Springs, and there is some lakes there that have lots of honker geese on the year around, and it overlooks the valley, and down at the south is Goose Lake, which is partly [535] in Oregon and partly in California.

Q. Looking down over that, is there a large ranch of which you were one of the owners?

A. Yes

(Testimony of Harry A. Utley.)

Q. What is that ranch?

A. The Bernard Ranch right joining the hotel.

Q. How big a ranch is that? A. 800 acres.

Q. And during the years that you have been there you have had many guests there, have you not, at your place?

A. Lots of guests during hunting season and fishing.

Q. What are your business activities there?

A. I am in the real estate and insurance business and do a lot of timber work.

Q. And are you in any way connected with the Savings & Loan Association there?

A. Yes, we have a Federal Savings & Loan—Lakeview Federal Savings & Loan.

Q. What is your relationship with that?

A. We just have it in our office.

Q. When you say “we” who do you mean?

A. My partner and I.

Q. That is a Federal Savings & Loan organized under federal statute, is that right?

A. That’s right. [536]

Q. Home Loan Bank Act?

A. That’s right.

Q. Have you any other activities? Are you identified with any corporations?

A. Yes, several.

Q. Will you just state briefly and quickly what they are?

A. The Southern Oregon Ranches is a separate ranch deal that I am interested in with some other

(Testimony of Harry A. Utley.)

California men and we raise cattle—pure bred Hereford cattle.

Q. T-Bone Ranch?

A. T-Bone Ranch, and the Southern Oregon Ranch.

Q. And was Mr. Houston associated with you prior to his death in the T-Bone and the Southern Oregon Ranches? A. That's right.

Q. And did you make money out of those ranches? A. Yes, we did all right.

Q. And could you just tell us—in one year you made a very good sum there, did you not, in grain?

A. Yes.

Q. Which ranch was that?

A. That is the Southern Oregon Ranch.

Q. And about what did you produce out of that ranch? A. Grain principally.

Q. Yes, but how much? How much of a crop did you take off?

A. Oh, about a \$12,000 crop. [537]

Q. And what did you pay for the ranch?

A. 21,000.

Q. And were you planning to expand the operations at all at the time of Mr. Houston's death?

A. Yes, we had plans on buying any other ranch that was cheap around there that we thought was a reasonable buy and expanding.

Q. Did you have any ranch in particular in mind that you were discussing with Mr. Houston?

A. Yes.

Q. Just prior to to his death?

(Testimony of Harry A. Uteley.)

A. Several other ranches.

Q. Can you name one or two of those?

A. Well, we were going to buy the Laird Ranch in Warner Valley. That is just east of Lakeview. I think it was about \$225,000 and Mr. Houston was going in along with us on the deal.

Q. And were you present when he made arrangements for the financing of a part of that ranch?

A. Yes; he called his father in Denver and was able to get at least \$30,000.

Q. When did you first meet Mr. Houston up at Lakeview?

A. At Lakeview?

Q. Yes.

A. Oh, I don't know. It is about ten years ago. He was [538] with the Fire Association—manager of the Fire Association, and he liked to hunt and fish, and I invited him up there.

Q. You also have an insurance business, have you not, in connection with your business?

A. Yes.

Q. That is the largest insurance business in and about that place, is it?

A. It is the largest in Lake County, yes.

Q. So you met Mr. Houston in connection with insurance; is that right?

A. That's right.

Q. Through the years after you first met him, did your association develop so that you spent more time together or less?

Q. What was that question again?

(Testimony of Harry A. Utley.)

Q. Through the years after you met Mr. Houston and prior to his death, did your relationship become closer or further away? Did he come to spend a good deal of time with you when up there?

A. Oh, yes, we became very close friends. He loved to hunt and fish, and so did I and he loved horses and rode them and we hunted deer horseback, and everything that he liked to do, seemingly I liked to do, and so we was great friends and pals.

Q. Was he often a guest in your home? [539]

A. Yes, very often.

Q. And what did your family consist of, Mr. Utley, at that time during the earlier years when he was up there? Who was there in the house?

A. I have a son and two daughters.

Q. Two daughters?

A. Two daughters.

Q. Just give their names, if you will.

A. Virginia Wilkerson is one, and Phyllis White is my oldest daughter.

Q. Your son? A. Bob Utley.

Q. Robert? A. Robert Utley.

Q. What business is he engaged in?

A. He is in the insurance business.

Q. And where? A. In Portland.

Q. And do you know what company he works for, if any?

A. Yes, he works on the estate work for the Canadian Life Insurance Company.

Q. I will show you Defendant's Exhibit C which is an application for a life insurance policy,

(Testimony of Harry A. Utley.)

which application is dated Portland 5, Oregon, 18 September 1953, and I will ask you if the signature appearing on the lower lefthand side of that as a [540] witness to the signature of Mr. Houston on that application was your son.

A. That's my son Robert.

Q. Were your children in the home there through the years when Mr. Houston used to come up and stay with you? A. Yes.

Q. And was Robert among them?

A. Yes, often.

Q. Did he ever accompany you and Mr. Houston on trips?

A. Yes, lots of hunting trips.

Q. And you have stated that you used to have a great many guests up there. Referring now to the times when Mr. Houston was up there, will you state very briefly some of the guests that you had in your home when Mr. Houston was there?

A. At one time I remember we had Robert Noyes of the Crown Zellerbach Paper Company. We had Robert McCormick. His father was of the McCormick Steamship people. Jack Meyer of Meyer & Frank in Portland, and Paul Weyerhaeuser of Weyerhaeuser Timber Company. They would come down about every year and go hunting with us, and many others.

Q. Douglas McKay?

A. Yes, Douglas McKay.

Q. What is his present position?

(Testimony of Harry A. Utley.)

A. He was the governor when he was down there.

Q. Governor Hall? [541]

A. Governor Hall.

Q. Justice Douglas?

A. Yes, Justice Douglas.

Q. Did you have some attorneys there from Eureka, California?

A. Yes, Hoover and Goodwin—they are attorneys from Eureka—and Rudy Abrahamson who runs the White House there—it is a large store in Eureka. They fly up there every year and go duck hunting with us.

Q. And would you have Mr. Houston stay all night in your home on many occasions?

A. Oh, yes.

Q. And he also acquired a cabin, did he not, right out near one you had?

A. That's right.

Q. Near the fishing?

A. That's right.

Q. What river is that on?

A. On Sprague River.

Q. And how far apart were your cabins?

A. About a mile.

Q. Would you see a great deal of each other when you were out there both occupying those cabins?

A. Yes, we hunted and fished together all the time.

(Testimony of Harry A. Utley.)

Q. And do you know whether Mr. Houston brought guests up from here to his place? [542]

A. Yes, quite a few guests.

Q. Mrs. Houston and the daughters?

A. That's right.

Q. And Don Campbell? A. Yes.

Q. Was he in your place many times?

A. Many times.

Q. And did Mr. Houston ever bring his insurance agents of the New Zealand Insurance Company up there?

A. Yes, he has. He had Sir James Gunson from New Zealand with him at one time.

Q. And he is one of the directors of the New Zealand company?

A. He is chairman of the board of New Zealand Insurance Company.

Q. And they went all around and hunting and fished from your house?

A. Yes, we hunted and fished together.

Q. Entertained them socially at social events?

A. Yes, sir.

Q. Did you see that Mr. Houston acted any different on those occasions with respect to drinking than he did when Sir *Dennison* wasn't there?

A. No, just the same.

Q. You recall the incident of an automobile accident that was mentioned, or do you remember that Mr. Houston had an [543] automobile accident?

(Testimony of Harry A. Utley.)

A. He mentioned it to me but I didn't know any particulars.

Q. At the time of that accident did Mr. Houston have a number of insurance men up there at Lakeview with him?

A. Yes, he had some agents—one agent from the South that had a new Cadillac and he was taking him around a lot showing him the country, and it was all so different down in Georgia.

Q. Were other agents there at that time, too?

A. Yes.

Q. You had great opportunity to observe Mr. Houston, did you not, as to whether he was a happy person or an unhappy person?

A. Oh, yes.

Q. Would you describe for the Court just how you could classify Mr. Houston with respect to whether he was depressed or morbid or a person worrying?

A. Well, he was always a very cheery person. He always had something doing. He was always active and he always had some plans on going sage hen hunting or duck hunting or deer hunting. He was a very cheery and thorough business man.

Q. And did you ever see anything in the nature of a Dr. Jekyll and Mr. Hyde in Mr. Houston, would you say?

A. No, no.

Q. And how did he dress when he came up there?

A. Well, he always come up during the roundup and we all put on our jeans and five gallon

(Testimony of Harry A. Utley.)

hats and of course entered [544] right in with the spirit of the occasion. And he was usually there when the Four-H boys—when the Rotary Club would sell the Four-H stock, and we bid in some of those choice steers at two or three times what they were worth just so the kids would get a big price for their stock. We had a lot of fun doing it.

Q. And did Mr. Houston kind of enter into the spirit of the affairs there that he went to with you? A. Yes.

Q. Would you say that he acted the same or different than other people that were joining in those activities?

A. No, he usually fit into the occasion.

Q. Did you ever see him wear a coonskin cap?

A. No. Lots of big five gallon hats.

Q. What would you call them? Cowboy hats?

A. Cowboy hats.

Q. What were they? Stetsons? A. Yes.

Q. Did they have a name for them? Five-H Stetson or something?

A. Oh, I don't know.

Q. You don't know the name. Do you remember the incident of Mr. Houston firing a revolver in your office?

A. Yes, one time up with—he had a .22 with some blank shells and he came in the office with some of his friends from San [545] Francisco and he fired the gun off just for the fun of it in the office. They all knew he was there.

Q. He fired it as a salutation, a greeting?

(Testimony of Harry A. Utley.)

A. That's it.

Q. That he had arrived?

A. Yes. We were all having a lot of fun about it.

Q. And that was all in a joking spirit, was it?

A. That's right.

Q. What was the last time you saw Mr. Houston alive?

A. Well, I think that he and I brought the horses down in the fall of the year to Berkeley.

Q. And that is the last time you saw him before his death?

A. I think we had two trailers and the horses.

Q. At that time you saw nothing unusual or different in his manner or in his spirit?

A. No.

Q. Had you communicated with him by phone at all between then and the date of February 22, 1954?

A. Well, I was on a trip to South America when he passed away.

Q. Oh, I see. You got married, didn't you, and you were gone? When you came back to San Francisco from that trip were you entertained here by Mr. Houston?

A. No, he passed away when I was in Brazil.

Q. And all the years that you knew Mr. Houston had you ever [546] seen him drunk?

A. No.

Q. Did you ever see him under the influence of

(Testimony of Harry A. Utley.)

liquor to the point where he staggered or was incoherent?

A. No. We had social drinks together but he always could handle himself with wonderful shape. I never saw him where he couldn't.

Q. By the way, Mr. Robert Utley's wife used to work for Mr. Houston, didn't she, before they were married?

A. That's right. When he was to the war.

Q. While he was off in the service Mr. Robert Utley's wife came down and worked for Mr. Houston, is that right?

A. That's right.

Q. You said you were associated with Mr. Houston in these farming ventures and that you had planned and were planning to expand those activities; is that right?

A. That's right.

Mr. Angell: I think that is all.

Cross Examination

Mr. Clausen: Q. Mr. Utley, do you drink yourself? A. Occasionally, yes.

Q. Seldom, is that right?

A. Just once in a while.

Q. The girl who testified by deposition in this case, Virginia Wilkerson—is she your daughter?

A. That's right.

Q. And your home is across the street, is it not, from a so-called Hunter's Lodge?

(Testimony of Harry A. Utley.)

A. Near Hunter's Lodge.

Mr. Clausen: That is all.

Mr. Angell: That is all. Thank you very much.

Mr. Taylor.

EVANS M. TAYLOR

called as a witness on behalf of the plaintiff; sworn.

The Court: Q. Your full name?

A. Evans M. Taylor.

Q. And where do you reside?

A. In Piedmont.

Q. And your business or occupation?

A. Attorney.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. You are an attorney, are you not? A. Yes.

Q. Where is your office?

A. 311 California Street.

Q. What is the firm name?

A. Thornton & Taylor.

Q. And Mr. Thornton is an old, old member of this bar who passed away a short time ago; is that right? [548] A. That's right.

Q. And how long have you been admitted to the bar of California, Mr. Taylor?

A. Some 25 years or more.

Q. And practiced right here in San Francisco?

A. Yes, sir.

(Testimony of Evans M. Taylor.)

Q. Admitted to all the courts of the State of California and Federal? A. Yes.

Q. You are an officer of this court?

A. That's right.

Q. Did you know Mr. Houston?

A. Yes, sir, I did.

Q. And when did you first meet him?

A. I would think probably 10 or 12 years ago.

Q. And in what capacity did you meet him?

A. Well, at that time I believe he was associated with the Fire Association of Philadelphia, and our firm for many years had represented that company as well as a number of others.

Q. In the course of the years from when you first met him up to the time of Mr. Houston's death, did you see him during those years frequently? A. Yes, I did.

Q. And would that be socially or in business matters? A. In both matters. [549]

Q. And you attended social functions with him?

A. Yes, I did.

Q. Were you ever in his home?

A. I have.

Q. You know Mrs. Houston?

A. I do, yes.

Q. And what family have you?

A. I have a wife and a son and a daughter.

Q. And did you have Mr. and Mrs. Houston in your home?

A. They have been in my home on occasions.

Q. And entertained them? A. Yes, sir.

(Testimony of Evans M. Taylor.)

Q. And you went on social functions together in the insurance world? A. We did that.

Q. And you were present at a great number of insurance company conventions where the insurance fraternity gathered like the Bar Association have their annual conventions?

A. A number of such events, yes.

Q. And you likewise were attorney for the New Zealand Insurance Company?

A. That's right.

Q. And in connection with that you had occasion to do business with Mr. Houston as the manager of the United States for that company?

A. I did.

Q. And did you have, would you say, a fair opportunity to observe Mr. Houston as to his nature and conduct, as to whether you would say he was a depressed man or a morbid man or a morose and melancholy man?

A. I did have a number of occasions to observe him, yes.

Q. And would you just state in your own language a word picture of how you would describe the characteristics of Mr. Houston with respect to his emotional moods?

A. Well, I would say he was essentially a very friendly person, a person who not only seemed to enjoy things and events but thoroughly enjoyed people, and an active person.

Q. Would you call him a depressed person?

A. Not in any sense.

(Testimony of Evans M. Taylor.)

Q. Did you ever see him depressed?

A. No, I wouldn't say that I ever saw him depressed.

Q. Did you ever see him morbid?

A. No.

Q. Did you ever hear him say he would take his own life or commit suicide?

A. No, sir, I never have.

Q. Did he ever express in any way a desire to remove himself from his environment?

A. No indication of that character in any respect.

Q. Did you observe him to be happy in his business life? [551]

A. He seemed to be a thoroughly happy soul.

Q. And his wife and family?

A. Oh, yes.

Q. You were in business also with Mr. Houston, were you not?

A. Yes, we had some ventures.

Q. You saw him, as a matter of fact, the day before he died, did you not?

A. That is true.

Q. In what business activities were you associated with Mr. Houston?

A. I have heard mention here of the Southern Oregon Ranch and T-Bone Ranch, and we were associated in those ventures.

Q. Were you substantially or a substantial owner in those? A. I think so.

(Testimony of Evans M. Taylor.)

Q. How did you come to make those investments in those ranches?

A. Those were primarily made through my friendship and affiliation with Mr. Houston.

Q. Do you know anything about farming yourself? A. Nothing whatever.

Q. Did you own any interest in any farm or ranch properties prior to associating yourself with Mr. Houston? A. No, sir.

Q. Did you depend implicitly upon Mr. Houston to carry that project on to success? [552]

A. Decidedly so.

Q. And who was in that project with you and Mr. Houston in the T-Bone? Take that first.

A. Well, I believe originally—there were some variations; there was Mr. Wilkes, Mr. Utley, Mr. Houston and myself.

Q. Was that Mr. Harry Utley who was just on the witness stand?

A. Who has just left the witness stand, yes.

Q. You said there were some variations. At the time of Mr. Houston's death, how was that stock owned?

A. I believe it was in that form then.

Q. Did you all own about an equal interest in it?

A. About an equal interest, yes.

Q. And there was Mr. Wilkes?

A. Mr. Wilkes.

Q. And what is Mr. Wilkes' first name?

A. Gilbert.

(Testimony of Evans M. Taylor.)

Q. Is he in this courtroom now?

A. He is. He is sitting there.

Q. And did Mr. Houston meet with you on a Sunday out at Mr. Wilkes' home in Orinda, just the Sunday before his death?

A. He did that, yes; we had a meeting there.

Q. And before we go into the events that occurred there, I would like you to state in your own language, if you can, the drinking habits of Mr. Houston as you observed them over the [553] last four or five years before his death?

A. I would say that his habits were habits of social drinking. I have never seen him intoxicated and I have never seen him in a position where he did not appear to have all his faculties.

Q. And you went to many, many cocktail parties, did you not, and at these meetings with these insurance people? A. Quite a few.

Q. Did you ever see him intoxicated at any of those? A. No.

Q. Did you ever see him when he didn't have full control of his mental capacities or ever talked incoherently? A. No, sir.

Q. Or did you ever see him where he couldn't drive his car? A. I have not.

Q. Now, going to the Sunday prior to Mr. Houston's death, what time did you arrive out at Mr. Wilkes' place?

A. Generally speaking, I would think it must have been somewhere around 2:00 o'clock in the afternoon.

(Testimony of Evans M. Taylor.)

Q. Where did Mr. Wilkes live?

A. He lives in the Happy Valley section over in Contra Costa County near Lafayette.

Q. That is the little valley there off to the left of the road where you go up from the nursery there, is it?

A. That is true, and to the north of the highway. [554]

Q. And Mr. Stanley Baller lives up in there?

A. Somewhere in that general area.

Q. And Mr. Henry Kaiser has a large home up in there, has he?

A. I understand he has.

Q. Now, what did you meet out there? What was the occasion of that meeting?

A. Well, primarily it was for the purpose of going over the planting program for the ranches for the next season. It was necessary to determine not only what kind of a planting program we were going to have, but also there was some discussion as to whether we were going to expand the stock that was run on one of the ranches, and Mr. Houston being primarily familiar with that, he had arranged for Earl Hawks who was looking after the place up there to come down and visit us and give us first hand information in San Francisco.

Q. That is Earl H-a-w-k-s, Hawks?

A. Right.

Q. Where was Earl Hawks' residence?

A. He was residing on a ranch of his own that was adjacent to one of the properties at Lakeview.

(Testimony of Evans M. Taylor.)

Q. You say you were planning to meet with Mr. Hawks here in San Francisco?

A. That's right, yes.

Q. To discuss further development of the ranches up in the Lakeview region; is that right?

A. That's right.

Q. And was there anyone present at that meeting other than Mr. Wilks, Mr. Houston and you?

A. I don't recollect at the time that there was. There may have been some other man that dropped in there during the afternoon, but, if so, I don't recall it.

Q. And how did Mr. Houston appear to be mentally on that day? Will you just tell the Court whether he appeared to be happy and enthusiastic about what was being done to develop these ranches or was going to do?

A. Yes, he did. He appeared to be enthusiastic about the program. It was something that was rather close to his heart, and he was interested in getting it started and getting this program laid out. I didn't see anything different in his attitude that day than would be characteristic of his general attitude.

Q. He seemed wholly congenial?

A. Certainly.

Q. No depression? A. No depression.

Q. No melancholy? A. No.

Q. Didn't look as though he was worried? Did he say anything about—did he look as though he was worried at all? A. No. [556]

(Testimony of Evans M. Taylor.)

Q. Did Mr. Houston comment that he was leaving to go to a party that night, or anything about his appointments for the night?

A. It doesn't ring any bell in my mind, no; I don't recall it.

Q. At the breaking up of that meeting did you leave with an arrangement for a meeting on the following Wednesday with Mr. Hawk?

A. Yes, we did. We had planned to meet Mr. Hawk at the hotel where an appointment had been made and a reservation by Mr. Houston.

Mr. Angell: Take the witness.

Mr. Clausen: No questions.

Mr. Angell: Just a minute. While Mr. Taylor is here and so he will not have to be recalled, I have those letters you asked Mr. Taylor to bring and I am very happy to proffer them to you at this time, Mr. Clausen, if you want to ask Mr. Taylor about them so he won't have to come back. The other things that I have here are just photostats.

Mr. Clausen: I think in view of the letter and the reference to the letter that Mr. Taylor may be properly recalled, Your Honor, with Your Honor's permission.

Mr. Angell: No objection.

Cross-Examination

Mr. Clausen: Q. Mr. Taylor, as I understand it, [557] counsel, Mr. Angell, just stated that you had brought the letters with you that I hold in my hand. Now I will ask you with reference to this one

(Testimony of Evans M. Taylor.)

written in pencil, for example, tell me what that is and where you got that, please.

A. This was a letter that Mr. Houston handed to me.

Q. And was that received from the party here, Vivian Chipman on this reply of November 10th?

A. I would assume that it was, yes.

Q. And refers here to a letter of November 9th, 1953. Is the one in your hand dated November 9, 1953? A. It is, yes.

Q. And when Mr. Houston handed them to you, what did he say?

A. He said that he had this communication and handed it to me and wanted to know whether it called for any reply, and whether he should make a reply.

Q. Yes. And you advised him what?

A. I advised him that, in my opinion, it did call for a reply, an acknowledgment; that it was a matter of concern and consideration with people who had effected the settlement with that party as had been reported to me.

Q. And is that how you came, Mr. Taylor, to have this reply of November 10th which I hand you now and which counsel just handed me as coming from your file or from your office?

A. Yes, that's right.

Q. And did you frame that reply from Mr. Houston? [558]

A. I did. I dictated that reply.

(Testimony of Evans M. Taylor.)

Mr. Clausen: We will offer these in evidence, if the Court please, as Defendant's next in order.

The Court: Let them be admitted and marked.

Mr. Angell: I will ask that they be read into the record.

The Clerk: Defendant's Exhibit K admitted and filed in evidence.

(Letters above referred to admitted in evidence and marked Defendant's Exhibit K.)

Mr. Clausen: Does your Honor wish them read now?

The Court: Yes.

Mr. Clausen: The one in pencil, your Honor, is dated November 9th, 1953. It is 315 something Brigado Drive, Oakland, California, with a telephone number under it, "Lockhaven 9-4579.

"Dear Bill:

"Have tried to contact you by phone several times at your office to no avail. I can't understand why you haven't called. Have you let me down?

"When I came to the Bay area I wanted to get the doctor's name I was supposed to see here, but you are a hard man to contact, and I had to go to a doctor so I went to one near here, and I need the name of the doctor in Lakeview because I need the X-rays. Can't afford to have more made."—"can't [559] afford to have more. I took the money I had and bought a car because it's far out here and I need one. Now I am stuck here at Izzy's house in Oakland without a dime. I am going back to work in about four weeks, but, Bill, I want to

(Testimony of Evans M. Taylor.)

go to Los Angeles and be with my father and daughter, and I don't even have gas money and Izzy is on the road and won't be back for two weeks.

"I can't understand why you are trying to avoid me, Bill. You said you would help me for three months, but that's O.K. if you can help me with enough for just a little while. This is terrible to be stuck here and I don't know a soul here but you and so—and want to get to Los—L.A., as I am going to work in Texas. I have a lot of friends there. See your way clear to call or come by and see me, Bill. You're safe here and no one will see you.

"The least you can do is help me get out of town, even if it's a loan, Bill. I simply don't have anyone to turn to. This is a heck of a mess for me to be in and the least you can do is help me through this month.

"After all, I've been good about this whole thing and I don't think I am asking too much. [560]

Call me, please, Bill. I'll be waiting."

Signed "Pat. Lockhaven 9-5479."

The envelope underneath that is written in the same hand in pencil marked "Mr. William Houston, personal and private, New Zealand Insurance Company, 334 California Street, San Francisco, California."

The answer is on the letterhead of the New Zealand Insurance Company. "November 10, 1953." Di-

(Testimony of Evans M. Taylor.)

rected to Vivian Chipman, 315 Brigado Drive, Oakland, California.

“Dear Madam:

“Mr. Houston received your communication of November 9, 1953, relative to your accident of October 19th, and having to leave on an extended business trip has instructed me to reply and to furnish you the information you requested.

“He regrets that he is not in a position to advance any funds that you may have need of as a result of the injuries sustained in said accident. If there have been any complications as a result of your injuries or a matter of additional medical or doctor bills, it is suggested that these matters be taken up with the insurance company with whom you made settlement. In this respect you should contact Mr. Thomas McNally, assistant claims superintendent of the London Guarantee and Accident [561] Company, Ltd., 360 Pine Street, San Francisco, California, telephone YUkon 2-0688. I am sure that they will do whatever the circumstances indicate to be fair.

“The doctor who treated you in Lakeview is Dr. W. P. Wilbur, 102 North D Street, and he will be in a position to supply you with the X-rays or information in connection therewith.

“Yours very truly,

“Ellen M. Hoffman, secretary to
Mr. Houston.”

With a carbon copy to Mr. McNally of the London Guarantee and Accident Company.

That's all, Mr. Taylor.

Mr. Angell: That is all. Thank you very much.

In reading this letter one of my associates got the impression that in reading, Mr. Clausen, by the inflection of your voice, the writer indicated that she was alone in the town, and that sentence of the letter which that seems to have occurred in was on the last page of the letter. "The least you can do is help me to get out of town even if it's a"—she has it spelled "l-a-on"—it is loan; it isn't a-l-o-ne. The reading of it in the way it was put in there, it sounded even if she had to leave alone by herself, yet the help she wanted was a loan.

May I recall Miss Hoffman before I call the next witness and ask a question in connection with this exhibit?

ELLEN MAY HOFFMAN

recalled as a witness on behalf of Plaintiff; previously sworn.

Redirect Examination

Mr. Angell: Q. I will show you Defendant's Exhibit K and I will ask you if you ever saw the three documents which form that exhibit. For the record, the three documents are the letter from Miss Chipman to Mr. Houston, the reply from Miss Hoffman, and the envelope.

A. Yes, I did, in fact, I stamped it in "November 10th."

(Testimony of Ellen May Hoffman.)

Q. Were you the one who received that letter in Mr. Houston's office? A. Yes, I did.

Q. And when it was received was it marked "Confidential and Personal"?

A. Yes. It says "Personal and Private," yes.

Q. And you opened it?

A. I did. I read it.

Q. You read it. And then what did you do with it?

A. I put it on the stack of mail for Mr. Houston to see.

Q. And thereafter—you have heard Mr. Houston testify that he dictated the reply to it?

A. Yes, he did.

Q. And you wrote it? [563]

A. That is correct.

Q. And you sent it?

A. That is correct.

Q. Did you ever send any further correspondence to Miss Chipman in connection with this accident? A. No, I did not.

Q. Did you ever receive any further communications from her? A. No.

Q. Either by telephone or letter or wire or any communication whatsoever?

A. No, I do not recall that I did.

Mr. Angell: That is all.

Mr. Gustafson.

ROGER GUSTAFSON

called as a witness on behalf of the Plaintiff; sworn.

The Court: Your name, please?

A. Roger Gustafson.

The Court: Spell your last name.

A. G-u-s-t-a-f-s-o-n.

The Court: Where do you reside?

A. Berkeley.

The Court: Your business or occupation?

A. I am in production control.

The Court: Production?

A. Control. [564]

The Court: Where?

A. United Centrifugal Pump.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. You have stated your address for the record, have you?

A. My address is 2921 Florence Street, Berkeley.

Q. You have stated your occupation?

A. Yes, sir.

Q. And you are married to Charlotte Houston, are you not?

A. That's right.

Q. The daughter of Mr. William Houston. And when were you married?

A. March 24th of 1951.

Q. And how long had you known the Houston family prior to your marriage?

A. I met the Houston family in the year of

(Testimony of Roger Gustafson.)

1947 at the summer camp—Berkeley summer camp at Tuolumne.

Q. And since that time was your acquaintance with them and visiting in their home continuous up to the time of Mr. Houston's death?

A. Yes, sir.

Q. You attended the usual family activities, did you? A. Yes, sir.

Q. After you became interested in Charlotte?

A. Yes, I did.

Q. Were you both students at the University of California then?

A. I didn't go to the University of California; I went to Armstrong's Business College.

Q. And she went to California, did she not?

A. Yes, sir.

Q. And how frequently would you be in and about the Houston home? When you met them they were living on Shattuck Avenue, were you not?

A. That is right.

Q. And Marin Avenue in Berkeley?

A. That's right. 900 Shattuck Avenue.

Q. How often would you say you were there visiting?

A. Well, it kept increasing. As I got more interested in my wife I went more often.

Q. And you attended family parties?

A. That's right.

Q. And family affairs? A. Right.

Q. Before and after marriage?

A. That's right.

(Testimony of Roger Gustafson.)

Q. And attended social functions?

A. Right.

Q. And did you ever go up to Lakeview in Oregon on vacation? [566]

A. Yes, I went up on vacation for two years during the summer.

Q. And did you ride on weekends often with Mr. Houston? A. Yes, I did.

Q. And that would be out in Walnut Creek, Orinda, around that area? A. Yes.

Q. Mr. Houston had horses, did he not?

A. That's right.

Q. Referring now to the Miller Avenue residence where the Houstons were living at the time of Mr. Houston's death, you were in and about those premises frequently prior to Mr. Houston's death? A. Yes, I was.

Q. And were you familiar with the basement area? A. Yes, I was.

Q. And did you look at Plaintiff's Exhibit 1 here while you have been in the courtroom?

A. No, I haven't seen it until now.

Q. Will you look at it quickly?

A. Do you want me to go down there?

Q. Yes, apprise yourself with the exhibit. Now, do you know whether Mr. Houston kept any of his sporting equipment in that basement?

A. Yes, he did; he kept practically all of it there. [567]

Q. Can you indicate on that exhibit—are you oriented enough to locate on there the area where

(Testimony of Roger Gustafson.)

Mr. Houston kept his sporting equipment as you observed it?

A. Yes, sir. The horse equipment, saddles and fishing gear were in this area here. The guns were over in this corner (indicating).

Q. You are indicating the saddles as being along the west line of the space designated C-4 on Plaintiff's Exhibit 1; is that correct?

A. That's right.

Q. And you are referring to the place where you say Mr. Houston kept his guns as the place marked "Brooms and sweeper" on Plaintiff's Exhibit 1; is that correct?

A. Yes, sir.

Q. And did you ever seen any guns placed in that position there?

A. Yes, sir. I saw them put there by Bill—by Mr. Houston, and I also placed ones there myself.

Q. And will you first describe that passageway, the area in there, at the time those guns were put in there by you?

A. Well, that passageway was very narrow because of all the things that were stored down there in the basement in the way of sleeping bags, bedding, bedboards, chests, and such things as that.

Q. And you say you put guns yourself in there?

A. Yes, sir.

Q. Can you recall any time specifically when you put guns in there?

A. One time that I put the guns in that corner was the first part of November just before Mr.

(Testimony of Roger Gustafson.)

Houston's accident. I helped unload his car when he brought all of his gear back from Oregon, and I personally remember taking the guns from the car, carrying them into the basement and setting them in that corner.

Q. And how were they set in that corner by you at that time? Was there a gun rack there?

A. No, sir, there was not; I set them up against the wall.

Q. With the end of the barrel against the wall and the butt on the floor?

A. Yes, sir.

Q. And how many guns did you take in there at that time?

A. I took three guns in that corner at that time.

Q. And can you describe those guns?

A. Well, there was one long-barrelled gun and two shorter ones.

Q. And do you know what the long barrel was, what kind of a gun it would be?

A. No, sir; I am not enough of a hunter to know the gauge.

Q. Do you know a rifle from a shotgun?

A. Yes, sir.

Q. Was any one of those guns a shotgun? [569]

A. The long-barrelled one was a shotgun.

Q. The long-barrelled one was a shotgun?

A. Right.

Q. Were there other ones there?

A. Yes, sir.

(Testimony of Roger Gustafson.)

Q. How many other ones were there?

A. Two other ones.

Q. Will you describe those as you remember them?

A. One of them had a scope on it and the other one—the other short one just had a plain sight.

Q. I will show you Defendant's Exhibit B in evidence. Did one of them look like that gun?

A. Yes, sir, it did.

Q. Do you know the gauge of that gun?

A. No, sir, I don't.

Q. You are not a hunter? A. No.

Q. Did you know the gauge of the other gun?

A. No, sir.

Q. Was the other gun about this height?

A. Yes, sir.

Q. Could you positively identify this as the gun that you put in there?

A. No, sir, I cannot.

Q. I think you may resume the stand now. Did Mr. Houston [570] frequently go into the basement as you saw him? A. Yes, sir.

Q. And did you ever go in there when he went in to see what he was doing?

A. Yes, sir, I have been down there with him.

Q. What did you see him doing on any of those occasions?

A. Well, he would go down and maybe just work on his saddle or fishing rod—sort of a hobby place for him down there.

(Testimony of Roger Gustafson.)

Q. Did you ever see him down there in his bathrobe and slippers? A. Yes, sir.

Q. Pajamas? A. Yes, sir.

Q. You didn't see him on February 22nd, did you? A. No, sir.

Q. Would you say that happened frequently when you were around there or was it an unusual incident to have it happen?

A. Well, it was frequent.

Q. Did the time of day vary as to when you might see him in there? Did you see him there at any time of the day?

A. There was no set time.

Q. You had some of your own things stored in that basement area, did you not?

A. Yes, sir.

Q. Where was that? [571]

A. In the storage room adjacent to the furnace room.

Q. Is that the area shown on Plaintiff's Exhibit 1 on the board as G-2?

A. That's right.

Q. Called "Storage"? A. Yes, sir.

Q. About how big a room was that?

A. Well, it was about four by four, I would say.

Q. And did you have quite a bit of material in there?

A. Yes, sir; we had all our wedding presents that we were storing in there.

Q. Would you say that room was pretty full?

(Testimony of Roger Gustafson.)

A. Yes, it was. I never saw a gun in that storage room.

Q. You never saw a gun in that storage room?

A. No, sir.

Q. During the years that you knew Mr. Houston from 1947 up to the date of his death on February 22, 1954, had you ever been on social affairs or in the home when Mr. Houston was taking any alcoholic drinks?

A. Yes, sir.

Q. And did you observe his drinking?

A. Yes.

Q. And could you very briefly and quickly summarize how you would describe the drinking of Mr. Houston and the number of drinks? [572]

A. Well, at times—there would be times when he wouldn't take any at all; for instance, when he would come to my house for dinner, we wouldn't have any because I couldn't afford it; so at those times he wouldn't have any at all. Other times I would see him take I will say no more than three.

Q. Have you ever, in the years you have known Mr. Houston and been in his home and attended social functions, ever seen Mr. Houston drunk?

A. No, sir, I have not.

Q. Have you ever seen him with so many drinks aboard that he was incoherent or was not able to walk straight?

A. Definitely not.

Q. Have you ever been with him when he had drunk so much alcoholic beverage he could not talk coherently?

A. No, sir, never.

(Testimony of Roger Gustafson.)

Q. Or show any signs of the influence of alcohol? A. Never.

Q. Or drive? A. Never.

Q. Now, did you at any time observe any gun shells or rifle shells of any kind about the Houston residence there on Miller Street?

A. Yes, sir. I did.

Q. Just point out on that Plaintiff's Exhibit 1 if you saw any in that area that is shown there where you would see them. [573]

A. There were some back in this bookcase in the corner and there was also a cardboard carton along there with his saddles and fishing gear and with those things in it.

Q. Were the shells in that box?

A. There were some there, yes, and there were also some back in the corner in the bookcase.

Q. Did you ever seen them elsewhere in the house? A. Yes.

Q. Where else would you see them?

A. In his bureau drawer upstairs in his bedroom.

Q. In other words, it was the habit of Mr. Houston to have shells around the house any place; is that right? A. Yes, sir.

Mr. Angell: I think that is all.

Cross-Examination

Mr. Clausen: Q. While you are there, Mr. Gustafson, will you point again to the wall there

(Testimony of Roger Gustafson.)

where the saddles were heaped and where you found that box of shells?

A. It was right along in this area. (Indicating.)

Q. May I take a crayon and mark with the crayon an "X" on it?

A. In this general area. The saddles were hung on the rack right here.

Mr. Clausen: All right. I will just mark that G—we already have a G there. What is your first name? A. Roger. [574]

Mr. Clausen: I will mark that R-1. That was a box of shells, you say?

A. Yes, sir.

Q. The kind of shells that would fit what kind of a rifle?

A. There were shotgun shells and rifle shells; I cannot tell you the gauge.

Q. In other words, an assortment of shells in that box?

A. Yes, sir, there were.

Mr. Clausen: That is all.

The Court: We will take a recess.

(Recess.)

Mr. Angell: May the record show that I have asked Mr. Roger Gustafson to return to the stand for just one question.

ROGER GUSTAFSON

recalled as a witness on behalf of the Plaintiff; previously sworn.

(Testimony of Roger Gustafson.)

Redirect Examination

Mr. Angell: Q. You stated in your direct testimony that you had helped Mr. Houston unload the guns sometime in—or unload his car sometime in November, 1953, and that you had taken three guns back and placed them in what is shown on Plaintiff's Exhibit 1 as the "Brooms and sweeper" location.

Do you recall whether you ever saw those guns still there at any time after that?

A. Yes. The last time I can recall that is somewhere around [575] the middle of January.

Q. You recall seeing them there?

A. Yes.

Q. In the middle of January?

A. Yes, sir.

Q. Were you in the basement after the middle of January, do you know?

A. Yes, I was.

Q. Do you recall whether they were there or not?

A. No, sir, I do not, after that time.

Q. Was that because you didn't observe or that they were not there?

A. Because I did not observe.

Q. They may have been there and you not see them?

A. That's right.

Q. The last recollection you have of actually looking and seeing was somewhere in the middle of January?

A. Right.

Mr. Angell: That is all.

Mr. Clausen: No questions.

(Witness excused.)

GILBERT WILKES

called as a witness on behalf of the Plaintiff; sworn.

The Court: What is your full name, please?

A. Gilbert Wilkes. [576]

The Court: What is your business or occupation?

A. Secretary - treasurer, Mutual Stevedoring Company.

The Court: Secretary and treasurer. And where do you live?

A. In Happy Valley, Lafayette.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. Well, you have a tendency in speaking to speak so that it is hard to hear you out here. Would you direct your voice as though you were speaking to me, well out, and then counsel can hear? A. I will try.

Q. And the reporter can hear.

A. I will try.

Q. It will make it easier for all of us, and I won't have to repeat my question.

Mr. Wilkes, did you know Mr. Houston in his lifetime? A. I certainly did.

Q. And how long had you known him?

A. I would say, well, since about 1945 or in there.

(Testimony of Gilbert Wilkes.)

Q. And when did you first become acquainted with him and in what capacity?

A. I met him through, as I recall, Frank Avery. He used to be the Fire Association manager for this area. He brought Mr. Houston up to the Kiwanis Club. That was my first meeting.

Q. Was Mr Houston a member of the Kiwanis Club? A. Yes, sir, he was.

Q. You said your business was the stevedoring business, did you not?

A. That's correct.

Q. How long have you been in that business?

A. Since 1927.

Q. Is that your own business?

A. I have a partner.

Q. And you operate that business. What is the nature of a stevedoring company business? What do you do?

A. We load and discharge ships for sea—and deliver cargo off the piers and handle railroad cars, discharging them.

The Court: Where?

A. In Francisco, Oakland and the bay area.

Mr. Angell: Q. You say that you first met Mr. Houston at a Kiwanis Club doing, is that right?

A. That's correct, meeting.

Q. How often between that time and the time you became associated with Mr. Houston in business did you see Mr. Houston? Would you see him frequently?

A. When he was in town he always attended

(Testimony of Gilbert Wilkes.)

the meetings, which is on Tuesday night at the Fairmont Hotel. I would see him at least that day and possibly another day.

Q. Did you ever visit Mr. Houston's home?

A. No, sir.

Q. Did he ever visit in your home?

A. Many times.

Q. With Mrs. Houston?

A. Mrs. Houston, yes.

Q. And you are married and have a family, have you not? A. That's correct.

Q. Of what does your family consist?

A. I have a married daughter, married son and a younger son.

Q. Did you ever become associated with Mr. Houston in business?

A. Yes, we entered into an enterprise—let's see—I am not sure whether it was in 1951 or in there somewhere—the Southern Oregon Ranches, we called it. Later on we formed another corporation to handle cattle, which was called the T-Bone Ranches.

Q. Who was associated with you first in the Southern Oregon Ranches?

A. Mr. Harry Utley and—original stockholders were Mr. Harry Utley, Dr. Christensen, Mr. Houston and myself.

Q. And in the T-Bone Ranch?

A. That was Mr. Taylor, Mr. Houston and myself.

Q. And were you about all equal owners in

(Testimony of Gilbert Wilkes.)

your interests in there or did someone have a greater interest?

A. Stock interest, yes.

Q. They were all—both corporations, is that right? A. That's correct. [579]

Q. Now, who managed those corporations, if anyone?

A. Well, Bill—I mean Mr. Houston was the manager—I mean, as far as I was concerned. I depended entirely on him for the handling of the affairs of the ranches.

Q. Would you describe him perhaps as the general manager? Would you?

A. Well, yes; he was the president of both.

Q. And then you had a man up on the ranches who took care of them?

A. That's right. Mr. Hock. He was a neighbor of the Southern Oregon Ranches and he did most of the plowing or planting, and later on he looked after the cattle that we had on the T-bone Ranch.

Q. The few years that you were engaged in that, would you say that you had been fairly successful financially?

A. Well, we had no complaint.

Q. Were you planning on expanding those operations at the time of Mr. Houston's death?

A. That was the original intent, was to enlarge the land area so it would run more cattle.

Q. Did you hold meetings just shortly prior to Mr. Houston's death to discuss that expansion?

A. That's correct. On Sunday that was——

(Testimony of Gilbert Wilkes.)

Mr. Angell: That is all.

Mr. Clausen: No questions.

(Witness excused.)

Mr. Angell: Plaintiff rests the case in chief.

Mr. Clausen: Your Honor, my witnesses are not present at the present time. I ask an adjournment now till the next day of court. I will have them here.

The Court: Take care of the adjournment until ten o'clock Monday morning.

(Thereupon an adjournment was taken to 10:00 o'clock A.M., Monday, November 14th, 1955.)

The Clerk: Houston vs. Canada Life, further trial.

Mr. Clausen: Ready, your Honor.

Mr. Angell: If your Honor please, at the close of testimony on Thursday I rested my case in chief. I am asking permission of the Court at this time to recall Mrs. Houston to reopen on chief, just for one short question. I looked over my record over the weekend and I note I failed in asking one question.

The Court: Very well.

CHARLOTTE H. HOUSTON

recalled as a witness in her own behalf; previously sworn.

Redirect Examination

Mr. Angell: Q. Mrs. Clayton, my recollection of your testimony is that you awakened Mr. Hous-

(Testimony of Charlotte H. Houston.)

ton on the after noon of February 22nd and then went down and got a glass of tomato juice and put it on the stairs, left it there for Mr. Houston to drink, is that correct? A. That's correct.

Q. And then he later drank it and then came downstairs and through the kitchen and into the basement, is that correct? A. That's correct.

Q. Now, referring to the time when you awakened Mr. Houston on that afternoon of February 22nd. Will you state, as year as [584] you can recall, about how long in time it was from the time that you awakened Mr. Houston until Mr. Houston came through the kitchen and went down into the basement when you heard the thud or noise?

A. I should say between five and ten minutes.

Q. And that's to the best of your recollection?

A. To the best of my recollection.

Mr. Angell: That is all.

Mr. Clausen: No questions.

(Witness excused.)

Mr. Angell: That's the Plaintiff's case.

KENNETH C. PINE

recalled as a witness on behalf of the Defendant; previously sworn.

Direct Examination

Mr. Clausen: Q. Officer Pine, you have been sworn and testified preliminarily in this case last week before we had the police department's notes here. I now have received from Lieutenant Sherry what has been marked Defendant's Exhibit F and which

(Testimony of Kenneth C. Pine.)

included at that time photographs, which are in this envelope which now have been introduced in evidence as "J" it looks like—in this group that I hold in my hand——. Would you hold the photographs, please, just temporarily—they are the usual police department records, and I believe you will find in there a statement, which I now show you and ask you if [585] that is your signature, Officer Pine. A. Yes, it is.

Q. K. C. Pine. Would you hold those in your hand, please? And would you tell me when that statement was made, in point of time after your observations and investigation of this shooting on February 22, 1954?

A. The report was signed by me at approximately 4:25 P.M.

Q. About when? A. 4:25 P.M.——

Q. That's—— A. ——of the same day.

Q. Of the same day as the shooting?

The Court: What date?

A. The 22nd of February.

The Court: All right.

Mr. Clausen: Q. 1954? A. 1954.

Q. 1954, is that correct? A. Yes.

Q. Just answer "Yes" or "No." Did you say "Yes"? A. Yes.

Q. Now would you explain, whether that was done in the usual procedure, for records of your Berkeley Police Department?

A. Yes, it was done in the usual procedure.

Q. From your examination of those records,

(Testimony of Kenneth C. Pine.)

that you hold in [586] your hand, are they kept in the ordinary course of business of the Berkeley Police Department? A. Yes, they are.

Q. And, by the way, Office Pine, how long have you been with the Berkeley Police Department?

A. Thirteen and a half years.

Q. And during the thirteen and a half years have you had occasion to investigate shootings, suicides? A. Yes, I have.

Q. On the specific occasion here, February 22, 1954, you tell me, from referring to your records there now, just about when it was that you arrived at the scene of the shooting.

A. I arrived there approximately 2:15 p.m.

Q. Were you accompanied by anyone else, Officer Pine? A. No, I went alone.

Q. And when you arrived did you view the body and the scene of the accident? A. Yes, I did.

Q. Did you observe the conditions as would appear on the external surfaces of the body, the wounds of the body, as shown by the photographs here——. Have you seen these photographs? .

A. Yes, I have.

Mr. Clausen: May I open them up, please.

Q. Would you look through those photographs, please, and tell me, is that the photograph of what you saw on that occasion? [587]

A. Yes, they are the same photographs.

Q. I have in my hand three photographs which show the body, and there are in my hand four photographs which show the gun.

(Testimony of Kenneth C. Pine.)

You have marked on the board—rather, on the diagram on the board—the two points; one is marked P-1, where you saw the body, and I will ask you whether these three photographs indicate the approximate position of the body as you have indicated upon the diagram.

A. Yes, that's approximate.

Mr. Clausen: Your Honor, I think——. Well, it is obvious from the pictures they are of the body. I was going to ask that they be marked separately. In any event——

The Court: Do you offer them?

Mr. Clausen: They are in evidence, your Honor.

The Court: Very well.

Mr. Clausen: They were introduced as a group. I merely called attention to the fact that these three just now identified by the witness perhaps should be marked separately.

The Court: That is what I have in mind.

Mr. Clausen: All right, your Honor. They are marked J. May they be marked J-1, 2 and 3?

The Court: You will have to consult the Clerk on that.

The Clerk: Defendant's Exhibit J-1, J-2 and J-3.

(Exhibit J further identified as Exhibits J-1, J-2 and J-3.) [588]

Mr. Clausen: Q. Officer Pine, I show you the remaining four photographs, which apparently show a gun, and I will ask you, do they show the

(Testimony of Kenneth C. Pine.)

gun at this point that you have indicated on the diagram P-2?

A. I can't be too sure of the position of the gun in the picture as marked on the diagram.

Q. As far as you recollect, is that correct, though?

A. As far as I recollect, the pictures were taken before the gun was moved.

Q. Yes. So if those are the police photos, they would be the photos taken of the gun before it was moved from the spot where you saw it when you arrived, is that correct?

A. As I recall, yes.

Q. Is that correct?

A. That is as I recall it.

Mr. Clausen: Then may these be marked, your Honor, in the following sequence?

The Court: They may be admitted and marked.

The Clerk: Defendant's Exhibit J-4, 5 and 6 and 7.

(Photographs further identified and marked.)

Mr. Clausen: Q. Officer Pine, when you arrived at the scene—you can refer to your notes if you need—you have the permission of the Court—when you arrived at the scene of the shooting, did you receive information from some persons there? [589]

A. Yes. I talked to Mrs. Houston.

Q. Would you refer to your notes there, Officer Pine, and tell me if you received information from any other person?

A. Yes. There were Mrs. Houston's daughter Ann, and her mother, Mrs. Spaulding.

(Testimony of Kenneth C. Pine.)

Q. What, if anything, was told you by Mrs. Houston as to a possible motive in this case?

A. She——. Mrs. Houston?

Q. You can refer to your notes if you wish, Officer Pine for the exact words.

A. Mrs. Houston told me that her husband had been under pressure, had been working hard getting some reports out for the year, and that at times he was depressed. However, over the week-end he had been in good spirit.

Q. Now, referring to your notes there, Officer Pine, did you receive any information from any member of the family as to where guns were stored in the house?

A. Ann Houston; Miss Houston.

Q. The daughter? A. The daughter.

Q. She stated what to you?

A. She showed me a closet underneath the stairway in the basement section.

Q. Yes.

A. Where guns were stored; where she said guns had been [590] stored over a period of time.

Q. All right. As a result of your observing at the scene and from your observations of the body, from your discussions with the parties there, did you rule out the possibility of murder?

A. Yes, I did.

Q. What did you conclude in respect of the method by which this man was shot, referring to your notes, Officer Pine?

Mr. Angell: May I—just before the witness answers, may I make my objection?

(Testimony of Kenneth C. Pine.)

The Court: You may.

Mr. Angell: To which we object on the grounds as incompetent, immaterial, irrelevant, not within any issue in this case, calls for opinion or so-called expert testimony without having established the qualification that this man is an expert, and, further, on the further ground that the question whether a death is due to accident or suicide, under all the cases, your Honor, is not subject to opinion or expert testimony. That is what your Honor has to decide or a jury, if it were before a jury. So even though this officer would testify that he came to the conclusion that it was one or the other, that would not be proper evidence to admit in this case, and, in fact, it would be improper and prejudicial.

The Court: Submitted?

Mr. Clausen: Yes, your Honor. [591]

The Court: The objection will be sustained.

Mr. Clausen: Now, I adhere, of course, to your Honor's ruling, but I had in mind——

The Court: You may reframe your question, whatever you have in mind.

Mr. Clausen: All right, your Honor.

Q. From your observations of the scene of the shooting and of the body and based on your experience in similar cases Officer Pine, did you reach a conclusion which you have set forth in your report there as to the method of shooting?

Mr. Angell: Same objection.

The Court: Same ruling.

Mr. Clausen: I had in mind, if the Court please,

(Testimony of Kenneth C. Pine.)

the Court let in evidence the other day, the testimony——

The Court: Refer to these notes here that he made. You may develop what he has.

Mr. Clausen: All right.

Q. Did you set forth on the notes that you have there, Officer Pine, the statement as to your conclusion of the shooting?

A. Yes, I did, on this report.

Q. All right. May I take the notes?

A. (Witness producing.)

Mr. Clausen: I offer in evidence, if the Court please, the notes signed by Officer Pine dated February 22, 1954, and [592] from which he has testified and which he has identified.

Mr. Angell: May I make my objection?

The Court: You may.

Mr. Angell: The same objection, your Honor, as to everything on this exhibit which has to do with the opinion of the officer as to the cause of death, whether it was accident or suicide. I believe the cases are clear that the statements or report made by the officer, if made at the time, would be admissible.

May I ask a couple of questions of the officer before this is admitted?

The Court: You may.

Mr. Angell: Q. Officer Pine, did you make this report at the time you were at the scene of the Houston home on February 22nd or afterwards?

A. It was afterwards.

(Testimony of Kenneth C. Pine.)

The Court: I thought it was the same day, was it?

A. The same day, approximately an hour and a half, and maybe two hours afterwards.

Mr. Angell: Q. About an hour and a half later. And will you look at your notes that you made at the time you were at the Houston residence?

A. My notes are in evidence here somewhere else.

The Court: Hand him them.

Mr. Angell: It would be Exhibit A. [593]

(Exhibit handed to the witness.)

Mr. Angell: Q. Now, referring to those notes, Officer Pine, will you tell me whether there is anything said in those notes as to any conversation with Ann Houston or Mrs. Houston?

A. There is one notation where Miss Houston said her father came downstairs about two. Otherwise, no, no written notes of any conversation.

Q. So that in this report that you made on the 22nd after you got back to the police station, that what you have made in there regarding conversations is your best recollection made at that time as to what was said when you were up there, is that correct? A. Yes.

Q. Now, are you an expert in firearms and guns? A. No, I am not.

Q. Have you had any experience with firearms or guns at all? A. Yes, some.

Q. What? A. In my police work.

(Testimony of Kenneth C. Pine.)

Q. Well, what would you say where that experience was?

A. Oh, yearly target practice, pistol and rifle, shotgun course.

Q. Just firing guns in your police target practice, is that correct? A. Yes. [594]

Q. But as to the mechanism of guns and types and calibers of guns, are you an expert in that field at all? A. No, sir.

Q. As I understand this report, Officer Pine, this was a report written up by you of what you saw and at the place up there at the Houston residence at 1082 Miller, February 22nd, after you had gotten back to the police station and made up a report, is that right? A. Yes.

Q. And you took down no verbatim notes as to any conversation, did you, Officer?

A. No, I didn't.

Q. Are you a hunter? A. No, I'm not.

Mr. Angell: Now, I will renew the objection, your Honor, upon the further ground it is not shown that the officer is qualified to make the observation that appears in this report. I do not know whether your Honor has seen this report. It might——

The Court: Pass it up.

(The court examining.)

The Court: The last paragraph I should say legally is objectionable, hearsay, calls for the opinion and conclusion.

Mr. Angell: That is exactly the part. The rest

(Testimony of Kenneth C. Pine.)

of the report I have no objection to. They are [595] notes made in the usual course. The opinion evidence there or statement purported to be evidence is inadmissible, your Honor, under all the authorities.

The Court: Do you object to this in its entirety?

Mr. Angell: I offer my objection to it in its entirety, first on the ground that it was not made at the time that he was up there but was made an hour and a half later in the police station, and only purports to be his recollection of what occurred there. So I will object to that on that ground.

I object specifically to his statement regarding the cause of death other than by gunshot wound, upon the ground that it is not subject to expert testimony.

The Court: I will allow it to go in evidence, with the exception of the cause of death and the opinion and conclusion of this witness.

Does that appear to clear up your situation?

Mr. Clausen: Which number will that be, Mr. Clerk?

The Clerk: Defendant's Exhibit L.

(The report of Officer Pine, limited by direction of Court, received in evidence and marked Defendant's Exhibit L.)

Mr. Clausen: You may take the witness.

Cross Examination

Mr. Angell: Q. Officer Pine, when you went to the Houston residence there on February 22nd,

(Testimony of Kenneth C. Pine.)

you went back into the corner, did you not, where the body was found—not where the body [596] was found; where the gun was found?

A. Yes, I did.

Q. And will you just for the record describe the physical appearance of that as you went in there, Officer Pine?

A. From the main section of the basement where you could stand erect, I had to duck under some clothes that were hung on the line, then step up onto a raised platform and walk with head bent down under these floor joists—in fact, to the corner, and it was a narrow passageway; there was furniture, articles—other articles stored in there, and I believe there was some camping gear and just odds and ends of household articles stored in this section, and there was a very narrow passageway through to a small opening at the corner.

Q. Did you have to stoop going in there, Officer Pine, as you went in, it was so low?

A. Yes. And after I got up onto the raised portion I had to stay stooped all the time.

Q. Was there laundry hanging in the basement?

A. Yes, there was.

Q. Now, did you have considerable difficulty in getting through this passageway where all that furniture was?

A. Well, considerable difficulty — actually—. The gun was lying on the floor there; I had to step over that as well.

Q. Was there an end table there?

(Testimony of Kenneth C. Pine.)

A. Well, there were articles of furniture, [597] which I don't know exactly.

Q. Will you step over to the exhibit and show now and point where you are referring to these articles of furniture?

A. This area; within here (indicating). It seemed to be more than just what shows on the board or on the diagram.

Q. To clear that up for you, Officer Pine, this drawing was made on November 2, 1955, and the man who made it only put the objects here that were there when he drew it and was told that those were there at the time. It does not show all of the things that were there when you were there. That is what I am trying to say.

A. No. There was, as I recall, a bit of open space right at here, in the corner (indicating).

Then there was some articles here that—that was just a very narrow passageway through here.

Q. Very narrow? A. At this point.

Q. Was there an end table in there?

A. I don't recall the pieces that were there.

Q. Now, referring, Officer Pine, to Plaintiff's Exhibit No. 1 in evidence. You have placed the body in this diagram in your previous testimony as being P-1, right alongside the ironer. Mrs. Houston—Clayton, rather, in her testimony and Mrs. Ann Hanscom, the daughter, placed the body over by the washing machine. Can you state from your recollection now [598] whether the body would be near the location you placed it at P-1, besides the

(Testimony of Kenneth C. Pine.)

ironer, or over by the washing machine where it has been placed by Mrs. Clayton and by Mrs. Ann Hanscom?

A. From the diagram I made at the scene, the body was closer to that position.

Mr. Clausen: Indicating P-1.

A. Of mine, P-1. From my recollection and the diagram I made at the scene, standing in the basement there.

Mr. Angell: Q. So you place it at about where you placed it, at P-1, is that correct?

A. Possibly a few feet further, but not as far as over here.

Q. You would not place it as far out as Mrs. Clayton and Mrs. Hanscom have? A. No.

Q. But you might place it a little further that way than you have placed it, is that correct?

A. It wouldn't be more than a foot or two further.

Q. I will show you Defendant's Exhibit J-2 and ask you if that would assist you any in referring where the body was.

A. Apparently from this picture and the diagram, these two posts or uprights would be approximately at the center—these I assume to be the uprights in the diagram, showing in the picture.

Mr. Clausen: Pardon—you were answering one question. Counsel is now giving you another. You were referring to this [599] and——

Mr. Angell: They are the same pictures that you put in, Mr. Clausen.

(Testimony of Kenneth C. Pine.)

Mr. Clausen: The point is, the reporter yet hasn't got the full answer.

A. There are these marks on the diagram indicating these uprights, the posts. The body would be moved forward probably another foot, another three, four, five feet, because in the picture it shows the posts to be about even with the knees.

Mr. Angell: Q. I will hand you all three of Defendant's Exhibits J-1, 2 and 3 and ask you: From looking at those photographs you can tell approximately where the body was; and, if it is not where you located it at P-1, would you then draw with a different colored chalk the place where you now place it after seeing those photographs?

A. If there is any change at all, it would be approximately a little bit further north and a little bit further to the east.

Q. The east is this way, here?

A. (Witness indicating.)

Q. Now will you mark that P-4?

A. (Witness designating P-4.)

Mr. Angell: Thank you. No further questions.

Redirect Examination

Mr. Clausen: Q. Officer Pine, when you spoke that day after you arrived with Mrs. Houston, the then Mrs. Houston, did [600] she appear composed to you? A. Yes.

Mr. Clausen: That is all.

Mr. Angell: No further questions.

(Witness excused.)

(Testimony of Kenneth C. Pine.)

ironer, or over by the washing machine where it has been placed by Mrs. Clayton and by Mrs. Ann Hanscom?

A. From the diagram I made at the scene, the body was closer to that position.

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A. (Witness indicating.)

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A. (Witness designating P-4.)

Mr. Angell: Thank you. No further questions.

Redirect Examination

Mr. Clausen: Q. Officer Pine, when you spoke that day after you arrived with Mrs. Houston, the then Mrs. Houston, did [600] she appear composed to you? A. Yes.

Mr. Clausen: That is all.

Mr. Angell: No further questions.

(Witness excused.)

EDWIN F. PARKER

recalled as a witness on behalf of the Defendant; previously sworn.

Direct Examination

Mr. Clausen: Q. Inspector Parker, you testified for us last week in this case before we had the records of the Berkeley Police Department which were produced by Lieutenant Sherry.

I now have in my hand the photographs and the police report. I will hand you, first, the series of papers, the bundle of papers which constitute the report, and I will ask you whether in there there are reports by yourself. A. (Witness examining.)

Q. Now, here, I notice a card. Is that a report by yourself in the file? A. Yes, it is.

Q. All right. May I take that first, please.

By the way, is that your signature on the reverse side of that card? A. Yes, it is.

Q. And those records were kept in the [601] ordinary course of business, were they, ordinary course of practice of the Berkeley Police Department? A. Yes.

Q. Now referring to that card, can you tell me, did you have a talk with anyone representing the family following the trip that you made to the scene of the shooting? A. Yes, I did.

Q. And on what day?

A. By telephone on the 3rd of March, 1954, and in person on the following day, the 4th of March.

Q. And who was that?

(Testimony of Edwin F. Parker.)

A. That was the attorney Angell who is present here.

Q. And then on the same day did you make a report yourself of what you had seen and observed and had been informed at the scene of the accident?

A. No. The report I made of what I had observed at the scene of the accident was dictated on the morning of February 23rd, the day following my visit to the scene of the shooting.

Q. Is that what you are now referring to?

A. Yes.

Q. So that this report was made the morning following the shooting?

A. Yes; I dictated it, concluded the dictation at 9:50 A.M. on the following morning.

Q. And does that report set forth your observations, what [602] you were informed, the result of your investigation? A. Yes, it does.

Q. Let me ask you, Inspector Parker, what was your assignment at the time that you made this observation on February 22, 1954?

A. Well, my assignment included various assignments, the principal ones being investigation of all homicides and felony assaults, except for robberies.

Q. And when you made the investigation on this occasion was there one officer in charge—I mean, you went there, as I understand it, Officer Pine was there; who was in charge of the investigation?

A. Officer Pine in this particular case, because it was not my duty to take over the investigation

(Testimony of Edwin F. Parker.)

unless there was indication that a crime was involved.

The Court: We will take a recess.

(Short recess taken.)

Mr. Clausen: Q. Inspector Parker, how long had you been with the Berkeley Police Department at the time of the shooting in this case, last year?

A. Over twenty-four years at that time.

Q. And during that period did you investigate homicides, including suicides? A. Yes, I did.

Q. And especially suicide by gunshot wounds?

A. All types of death which were not natural and certified [603] by physicians.

Q. And when you got to the scene of the accident, scene of the shooting, on this occasion, can you tell me who already, if anyone, was already there?

A. Officer Chandler, Officer Pine—I recall.

Q. You may refer to your notes, if you wish. Did you accompany anyone else to the scene?

A. I don't recall anyone with me.

Q. Your notes are there, the first document.

A. (Witness examining.) Oh, yes, Officer Wilen, one of the police photographers, left the station with me. I took him to the scene.

Q. When he arrived did he take these pictures which have been introduced in evidence and which I now show you? A. Yes, he did.

Q. And while you were there—you may refer to your notes. While you were there did the Coroner or a deputy coroner arrive?

(Testimony of Edwin F. Parker.)

A. Yes, deputy coroner Osborne.

Q. And what did he do that you saw?

A. In my presence the body was turned over so that we could observe the entrance wound of the bullet and he also unloaded the rifle involved in my presence and the presence of Officer Pine—I am quite sure was there.

Q. When you say “he” you refer to whom?

A. Mr. Osborne. [604]

Q. What was found in the rifle?

A. One discharged shell, cartridge, in the chamber.

Q. Were there any cartridges in the magazine?

A. No, it was empty.

Q. And I believe you already testified last week to the blast and the appearance of the wounds, so I won’t ask you again.

Did you, Inspector Parker, testify in any Coroner’s inquest? A. I did not.

Q. May I have that statement that you have signed there?

We will offer in evidence, if the Court please, the signed statement by Inspector Parker.

Mr. Angell: May we make our objection to that, your Honor?

The Court: You may.

Mr. Angell: Same objection as to the statement made by Officer Pine, objected to on the grounds of incompetent, irrelevant, immaterial, not within any issue in this case; it is hearsay, shows from the testimony he didn’t make the report until the next

(Testimony of Edwin F. Parker.)

day; upon the further ground as to the opinion testimony of Inspector Parker as to whether it was an accident or suicide; the same objection as that is urged, the same objection as to the conclusion of Officer Pine, it is not a subject of expert testimony, that it is for this Court or a jury, if it were before a jury, to determine, and accordingly it is inadmissible, it would be error to admit it.

The Court: What are the contents of it?

(Examined by the Court.)

The Court: At this time I will sustain an objection to this document. You may develop the facts therein enumerated.

Mr. Clausen: Your Honor, I think they have been fairly well developed between the examination today and also of last week.

The Court: Just so that you may know what I have in mind, there are opinions and conclusions in this document which are legally objectionable.

Mr. Clausen: Well——

The Court: The other recital there is evidence in the record in every detail.

Mr. Clausen: That is what I had——. All right, your Honor.

You may take the witness.

Cross Examination

Mr. Angell: Q. Inspector Parker, after referring to your notes, did you have a conference or a discussion regarding this matter, subsequent to February 22, 1954, with respect to the records?

(Testimony of Edwin F. Parker.)

A. Yes, I——

The Court: Pass the notes up here, Mr. Clerk.

Mr. Angell: That's the report—I am referring to the inspector's notes.

A. I don't have my original notes, but I do have a supplemental report in the file that was written on the 4th of March.

Mr. Angell: Q. Yes. And you had, as I understand it, before you wrote that note or prior——. When with respect to your meeting was that report written? A. Yes.

Q. When was it? Was it a report of the meeting?

A. On the 4th of March, 1954, I discussed the case with acting chief Fording and Lieutenant Sherry, superintendent of records.

Q. Go ahead. And is that report—is that a report made of that meeting?

A. Yes, this is a report made of that meeting.

Q. What I am asking is—what I want to ask is: Was the report handled in this case—was this case handled as a usual case of this type, insofar as the records of the Berkeley Police Department were concerned?

A. No, it wasn't because we have had no specific general order covering this particular type of condition and it was agreed at the meeting that all of the investigative data we had accumulated would be made available by showing (not by turning reports over) to representatives of either the family or the insurance carriers involved. [607]

(Testimony of Edwin F. Parker.)

Q. Now, at that time had the Coroner's inquest been called? A. No, it had not.

Q. And who requested the Coroner's inquest, if you know?

A. I did, in a conversation with the Coroner of Alameda County.

Mr. Angell: That is all.

Mr. Clausen: That is all. Thank you, Inspector Parker.

(Witness excused.)

Mr. Clausen: Call Mr. Bungarz.

BERNARD D. BUNGARZ

called as a witness on behalf of the defendant; sworn.

The Court: Your full name, please?

A. Bernard D. Bungarz.

The Court: Where do you reside?

A. 2633 Sixteenth Street, Oakland.

The Court: Your business or occupation?

A. Retired.

The Court: How long have you been retired?

A. Since January of this year.

The Court: Prior to that time what business, if any, were you engaged in?

A. Coroner of Alameda County.

The Court: During what period of time?

A. I was Coroner for two years.

The Court: For two years. Take the witness.

(Testimony of Bernard D. Bungarz.)

Direct Examination

Mr. Clausen: Q. For the two years, Mr. Bungarz, were you in the Coroner's office?

A. I was.

Q. That's the Coroner's office of Alameda County. And what positions did you occupy—what position did you occupy immediately before this two-year period when you were the actual Coroner?

A. I was the chief deputy coroner for eight years.

Q. Chief deputy eight years. All in all you had been in the Coroner's office how long as of the first of this year?

A. Thirty years.

Q. Thirty years. All right. Do you recall, do you, the case that we are trying, the case of William Houston? Do you recall that case?

A. Yes, I do.

Q. As of February, 1954, and would you tell me if it was a fact that in the usual course the body was brought in to the Coroner's facility? Is that correct?

A. That is right.

Q. And are there various alternatives open under the law for—rather, were there for you to make a conclusion in the matter of how the death was caused?

A. There was, yes.

Q. And explain those alternatives, Mr. Bungarz. [609]

A. I might by investigation give a cause of death.

Q. I beg your pardon?

(Testimony of Bernard D. Bungarz.)

A. I might by investigation give a cause of death.

Q. In other words, by your own investigation?

A. By my own investigation, and I might do it by calling a Coroner's jury.

Q. All right. Now, in this particular case, what was your original intention?

A. My original——

Mr. Angell: Objected to, your Honor, incompetent, irrelevant and immaterial.

Mr. Clausen: Your Honor——

Mr. Angell: He asked what he intended to do. The evidence is here that there was a jury inquest, a jury called, and the verdict is in evidence.

Mr. Clausen: I understand that and I am, your Honor, entitled, as I feel, to produce evidence in response to that.

The Court: There are two methods under the law to hear these matters?

Mr. Clausen: Beg your pardon?

The Court: There are two methods, are there?

Mr. Clausen: Yes, your Honor.

The Court: I will allow the question.

Mr. Clausen: All right.

Q. Your original intention was what, Mr. Bungarz, as Coroner? [610]

A. My original intention was to do it by investigation only.

Q. And had you proceeded in that, to use that method up to a certain point? A. I did.

(Testimony of Bernard D. Bungarz.)

Q. And had you reached a conclusion yourself as to the cause of death? . A. I did.

Q. What was that?

Mr. Angell: Just a minute. I object, your Honor, on the grounds incompetent, irrelevant and immaterial, that it is hearsay to this plaintiff in this case, that it is calling for opinion testimony or expert testimony, which is not subject to expert testimony, as I understand the question asked this witness, if he determined whether this was accidental or suicide.

The Court: Submitted?

Mr. Angell: Yes, your Honor.

The Court: Objection sustained.

Mr. Clausen: Q. In the course of your activities as Coroner for two years, as chief deputy for eight years, and as an employee of the Coroner's office for some full thirty years, during that period of time did you investigate or reach conclusions as to causes of death, of suicides? A. I did.

Q. And suicides by gunshot wounds?

A. I did. [611]

Q. And could you tell me the approximate number or could you tell me just about how many perhaps per year—give me some idea as to the number of cases of that kind in which you reached conclusions as to the cause of death.

A. That would be a hard question to answer. There are—they were numerous, but as to number, that would be a hard question to answer.

Q. All right. In this case you already testified

(Testimony of Bernard D. Bungarz.)

that you had proceeded by the investigation method of your own office and had reached a conclusion as to the cause of death. Now, what, if anything, intercepted—what, if anything, intercepted that official action that you were about to take?

Mr. Angell: Just a minute. Your Honor, I object to that as incompetent, irrelevant and immaterial, not within any issue in this case; it is not a proper subject to be introduced in evidence in this case. The fact is officially that this witness called a Coroner's jury, and eventually reached a verdict. If this witness came to a different conclusion, it doesn't carry any more weight in this court than perhaps the verdict of the jury carries, and certainly it is not admissible in this court. It is attempting to prove by alleged expert testimony whether a cause of death was suicide or accidental, and the cases are absolutely without a break that that cannot be done. It is inadmissible.

The Court: Submitted? [612]

Mr. Clausen: Submit it, your Honor.

The Court: Objection sustained.

Mr. Clausen: I don't want to intrude on your Honor's ruling, but I would ask this question, your Honor:

Q. Isn't it a fact that a person from the office of Mr. Angell asked you not to reach your conclusion and requested a jury inquest?

Mr. Angell: Objected to as incompetent, irrelevant and immaterial and is not within any issue in this case. What difference would it make if it

(Testimony of Bernard D. Bungarz.)

were true? I will say it isn't true. But what difference would it make? The official inquest was held.

Mr. Clausen: The difference is, if the Court please, that if counsel himself puts in evidence, as he has here, a jury's verdict or a verdict of a Coroner's jury, rather, which in effect says "undetermined," then I am entitled, your Honor, to disclose the full facts surrounding that verdict. I have here the man officially who had charge of the particular matter, of this particular inquest.

Mr. Angell: Your Honor——

Mr. Clausen: I intend to show, your Honor,—or, rather, to ask the witness further facts concerning this interpretation of his own act—in other words, the act for Mr. Angell's office who asked that the Coroner not list his own conclusion down of suicide but rather—— [613]

Mr. Angell: I object to that statement as being——

Mr. Clausen: ——but, rather, to proceed by Coroner's inquest.

Mr. Angell: I object to that as a statement of counsel. There is no evidence to that effect.

Mr. Clausen: I say I offer to prove.

Mr. Angell: There is no evidence to that effect in the record.

Mr. Clausen: I understand. I say I offer to prove that.

The Court: Well, if it is challenged. You say

(Testimony of Bernard D. Bungarz.)

it isn't. I will allow it. The objection will be overruled.

Mr. Clausen: Q. Now, did you have a call from someone purporting to be from Mr. Angell's office concerning your method of procedure in this case?

A. I did.

Q. And when was that, Mr. Bungarz?

A. I have no idea of the date, only that it was after the 22nd of February.

Q. All right. And was it before the inquest that was held in this case?

A. Yes, it was.

Q. And who did this party say he or she was?

A. Mr. Angell.

Q. And what request was made of you?

A. The request was that I hold an inquest because Mr. Angell [614] thought that he had some testimony that might change my ideas on it.

Q. And did you tell Mr. Angell that you had reached a conclusion yourself at that time?

A. I did.

Mr. Angell: Objected to as incompetent, irrelevant and immaterial. Now he is trying to——

The Court: The objection will be sustained. That may go out.

Mr. Clausen: All right.

Q. And did you tell Mr. Angell the reasons why you had reached the conclusion you had reached?

A. I did.

(Testimony of Bernard D. Bungarz.)

Mr. Angell: Same objection. Ask that it go out.

The Court: Same ruling. It may go out.

Mr. Clausen: Q. Was there any testimony given at the inquest which in any manner changed your original impression?

Mr. Angell: Same objection.

The Court: The objection will be sustained. It may go out.

Mr. Clausen: You may take the witness.

Mr. Angell: No questions.

Pardon me. Just one question.

Cross Examination

Mr. Angell: Q. Have you any notes, Mr. Bungarz, which [615] show the date of your conversation with me?

A. I have not.

Mr. Angell: No further questions.

(Witness excused.)

Mr. Clausen: Your Honor, the defendant rests.

Mr. Angell: If your Honor please, the plaintiff is ready to rest except for one piece of testimony, and that is as to the date that Mr. Bungarz says I called him. I am positive that his recollection of the date is wrong, but it will be in my office records and I would like to look at them and make sure of my memory and my recollection is that the first time I head of this case was on the 24th of February, that I was then on my way to Caspar, Wyoming, on legal business, that I did not return

until March 2nd. That is just my recollection. My calendar will show it. I want the record to show it. Just that one date.

Could we then go over to two o'clock and I will check the record? Outside of that, your Honor, plaintiff will be ready to rest.

Does your Honor wish this presented on arguments or on briefs?

The Court: Well, that it a matter for you gentlemen. I do not indicate in any fashion what you may or may not do.

Mr. Angell: We will discuss it and proceed accordingly.

The Court: Adjourned to two o'clock. [616]

(Thereupon an adjournment was taken until 2:00 o'clock p.m.) [616-A]

Mr. Angell: If your Honor please, prior to the noon recess I stated I wanted to look at my office records as to when I had talked to Mr. Bungarz, the last witness on the stand. I misunderstood Mr. Bungarz' testimony. I had the reporter read it to me afterwards, and Mr. Bungarz' testimony was that he spoke to me between the 22nd of February and the inquest. I thought he had said he had spoken to me on the 22nd. In view of that, I have no further testimony and no further rebuttal, and we rest.

Does your Honor wish oral argument?

The Court: Whatever you gentlemen desire.

Mr. Clausen: Does your Honor wish that——

Mr. Angell: Shall I proceed with the argument?

Mr. Clausen: Do you wish to proceed with the oral argument?

Mr. Angell: Yes, if——

Mr. Clausen: All right, then.

Mr. Angell: If the Court wishes to hear it.

The Court: Proceed.

Mr. Clausen: I will proceed.

Mr. Angell: Well, I will proceed. Anyway, I believe I have the right.

The Court: Proceed.

CLOSING ARGUMENT

Mr. Angell: If your Honor please, this is a relatively simple case so far as the issues are concerned. The issues as framed by the pleadings are that Mr. Houston in September filed his application of insurance with the defendant here, that the policy subsequently was issued, that the premiums were paid, and Mr. Houston met his death on February 22, 1954.

The defendant pleads two affirmative defenses. Those defenses are that there was a falsification of the application when Mr. Houston affirmatively stated in the application that he did not use alcoholic beverages, but socially and only occasionally and answering the further question as to whether he used alcoholic beverages to excess, his answer was that he did not. Calling your Honor's attention to the provisions of the application, the exact wording, the exact wording is, your Honor, question 6-A: "To what extent do you use alcoholic stimulants?" Then there is a place up at the top that says, "Answer." The answer is "Yes." And then "Socially only occasionally." And then there is a second part

to that question, 6-B: "Have you ever used them to excess?" The answer is, "No."

These are affirmative defenses, your Honor, and therefore they must be proved by a preponderance of evidence. The burden is on him who asserts those defenses.

The other defense is as to whether Mr. Houston died by his own hand or by accident, and the same rule of law applies. The burden of proof in both affirmative defenses is on the defendant by clear and satisfactory evidence.

As to the provisions in the insurance policy, your Honor, I don't think I could better put it than was put by the courts of this state in *Everett v. Standard Accident Insurance Company*, 45 Cal. App. 332, at 338, where the court said:

"The special defenses raised by appellant were all based upon the alleged fraud of decedent. The presumption is always against fraud. This presumption approximates in strength that of innocence of crime."

Citing the old, old case, your Honor, of *Truett v. Onderdonk*, 120 Cal., with which your Honor is certainly familiar.

"One who seeks relief from fraud must allege it and prove it by clear and satisfactory evidence. A mere suspicion of fraud is not sufficient. Here the evidence was conflicting in every particular. Consideration will be given to each of these"—and so on.

That is the rule of law as far as the application for insurance is concerned.

The same is held in *Moore v. Giffen*, 110 Cal. App.—I do not have the page citation here.

As to suicide, your Honor,—

The Court: Counsel has it.

Mr. Angell: I beg your pardon?

The Court: Counsel has that citation.

(Colloquy between counsel and associate.)

Mr. Angell: I will repeat for the record, *Moore v. Giffen*, 110 Cal. App. 659.

Beers v. California State Life Insurance Company; 87 Cal. App. 440, at 456:

“It must be borne in mind that the defendant entered the trial charged with the burden of overthrowing the presumption that the deceased was sane and that her death was not suicidal but from a natural cause. It rested upon the defendant to overcome said presumption, or, in other words, to support the affirmative defense of suicide, ‘by preponderance of clear and satisfactory evidence, direct or circumstantial’.”

Then citing 37 *Corpus Juris*, Section 443, page 640, and cases cited in the footnotes and “Also the above named cases.”

“And whether the defendant introduced sufficient satisfactory proof to overcome that presumption or to sustain the defense was a question to be solved by the jury.”

And then they went on and stated they would not set aside the jury verdict.

Another case stating the rule is *Wilkinson v. Standard Accident Insurance Company*, 180 Cal.

252, at 256, 29 American Jurisprudence, 1144, insurance, Section 1520.

Now, taking up, your Honor, the first and what appeared to be the most serious of the objections urged to paying this policy in this case, I will take up the question of intoxication or a fraud committed on the insurance company when the application was signed by Mr. Houston and he stated that he did use intoxicants, yes, socially and occasionally or only occasionally.

The first thing I would like to do is to review the testimony produced by the defense in support of that. They produced the deposition of Virginia Wilkerson. Mrs. Wilkerson was the daughter of Mr. Harry Utley that your Honor heard on the witness stand and who had been Mr. Houston's hunting company for some ten or twelve years, as well as his business companion. She had grown up with Mr. Houston when he was up in Oregon and which, incidentally, was a relatively short time each year, taking the whole year, and she testified then in response to a question she had seen Mr. Houston under the influence of liquor.

As to Jean *Pierson's* testimony, she was the waitress in Van's Restaurant or Cafe. She had never met Mr. Houston until just prior to the time when she testified, and she said she first met him, she thought, in October, and she had seen him two or three times and that when she saw him in the restaurant that he appeared to be intoxicated or to have been drinking. I call your Honor's attention to the fact that the application for this insurance was

signed on September 18, 1953. Jean Pearson's deposition, she stated she saw him in October 1953, which would be after the date of this application, hence under no stretch of the imagination could that be evidence upon which to find fraud committed, something done after the date of the application.

As against that flimsy evidence covering a relatively short time, and sporadic visits of Mr. Houston up to southern Oregon, we produced for your Honor the family of Mr. Houston, with whom he constantly lived. We produced his business associates, first in the insurance field, where he was an active man and where he took part in the insurance conferences and meetings of the insurance world. We produced his business associates in southern Oregon ventures, the T-Bone Ranch and the Southern Oregon Ranch. We produced his hunting companion, Mr. Harry Utley, who through all the years said he had hunted and fished with Mr. Houston as a close personal friend, in his home, with his wife, with his family, his daughter and his son, and each of them testified that they had never in their life seen Mr. Houston under the influence of alcohol, intoxicated, or so that his speech was heavy or mixed up or incoherent, that he had ever in any manner whatsoever shown any excessive use of alcohol.

As against the testimony produced here and against the presumption that a man does not admit fraud, we submit, your Honor, that there is no evidence that such drinking as they have proved isn't

right square within the definition as Mr. Houston answered those questions in that application.

The cases are clear that the questions in an application for insurance being worded by the carrier, they are most strongly construed against them. Now, if the insurance carrier here had thought those questions to be of such materiality to the issuance of that policy, they could very easily have asked on the signing of the application: How many drinks do you take a day? How many do you take a week? How many do you take a year? And not ask questions which are entirely subject to the interpretation of the man answering those questions. What one man might call "social and occasional drinking," another person might think was "heavy drinking." What one person might say was not excessive, another would say was excessive. So much depends on the man himself. To one not used to alcohol I suppose that one drink might make him intoxicated. I suppose that to a person who did not drink occasionally, that he might think if he took a drink once a week that that would be excessive.

Frankly, I have looked in the cases, I have looked in the books, I find no legal definition of any of those words. They are pretty much words of definition or judgment of the person answering the question.

Now, the agent for the insurance company was Mr. Robert Utley of the Canada Life. Mr. Robert Utley witnessed the statements given in there by Mr. Houston, and all I can say here is, your Honor, he was raised with Mr. Houston, he grew up with

him, he was inducing Mr. Houston to take out that policy. Now, surely Mr. Robert Utley didn't encourage Mr. Houston, an insurance man himself, to put anything that would be misrepresentation in the insurance policy. It would seem utterly incomprehensible. On the contrary, they are both insurance men; they both knew each other very, very well; they knew each other's habits, and apparently the agent thought that would be a correct designation of whatever use of alcohol he had seen so far as Mr. Houston was concerned.

Now we will pass to the question of the manner in which Mr. Houston met his death. The evidence here is without dispute, so far as actual evidence of the manner in which Mr. Houston met his death is concerned. That briefly summarized, is as follows: The members of Mr. Houston's family, his assistant manager, Mr. Masters, his secretary, Miss Hoffman, the attorneys for the New Zealand Insurance Company, his business associates, Mr. Wilkes and Mr. Taylor, and Mr. Masters, his hunting companion, Don Campbell, who was just like a son to Mr. Houston, Mr. Utley, all testified without any hesitance that Mr. Houston was of a naturally cheerful disposition, that he did his work easily, was very efficient in both his work and his sports, that he was not a nervous man, that they had never seen him in a depressed or melancholic mood, and as far as known to them, he did not evidence any depressive or melancholic nature. As to every witness, Mr. Houston was shown as a vigorous, energetic man who enjoyed a well rounded life; at home, free of

domestic difficulties; in business, standing high in the estimate of his employers and his associates; and in the insurance fraternity, successful in business; as a member of the Kiwanis Club and the insurance fraternities, he was highly respected and held in high esteem. It would be hard to show a clearer picture of a man well adjusted to life and loving life than the picture shown here of Mr. Houston.

On Friday, before Mr. Houston met his death, he put in a full day at the office, was congenial and happy, gave no evidence whatsoever of any thought of death. He made plans, which were shown on his calendar by his secretary, activities for the coming week. He said, no, he wouldn't stay to dictate a letter to the home office on a suggestion for the budget and for business activities for the coming year of 1954, that he would leave it until Tuesday when he came back. You will recall, your Honor, Miss Hoffman said that she would stay and they could get the letter into the mail. They had to meet a certain boat going over or a plane; that he said, "No, we can do it on Tuesday."

On the Saturday preceding his death he attended a function given for his daughter at her sorority. And on the following day, Sunday, he went to church, as usual, with his family and spent the afternoon with Mr. Wilkes and Mr. Taylor making plans for furthering their profitable farming and cattle venture in southern Oregon.

Certainly up to that time, your Honor, there wasn't the slightest evidence of any thought in this

man's mind that he was going to die, either accidentally or by his own hand. Mr. Taylor and Mr. Wilkes both testified that their cattle venture had been profitable, that they were planning on expanding, that they spent from 1:30 when they arrived out at Mr. Wilkes' home in Upper Happy Valley, and laid plans for going ahead with that; that they had the superintendent of that ranch coming down to meet them on Wednesday; that Mr. Houston gave no sign of any depression, of any melancholy or anything other than as he always was, and that is a happy, energetic business man, enjoying every bit of what he was doing.

Then that evening he had to hurry back from that meeting to a dinner with the Hanscoms. Mr. Hanscom took the stand here and testified that he attended that meeting. Other members of the family testified what occurred there. It was just a friendly evening. Ann Houston, the younger daughter of Mr. Houston, was engaged to Mr. and Mrs. Hanscom's son Ronnie, and that they were having a regular family get-together that evening. That the evening was spent in having a dinner, that they talked afterwards and just carried on in the usual conversation. Mr. Houston in no way evidenced any depression, any different attitude, manner or speech or action than he did at any other time.

Then what followed after? They left the Hanscoms and went home, and, according to Mrs. Clayton, they retired at around 11:30. Mrs. Houston testified that Mr. Houston slept until late in the afternoon, until she called. She said that was usual and

customary in the family, that they on holidays and weekends often did that.

She testified that she and Ann got up about 9:00 or 9:30, that they had their breakfast, and they had done things around the house; the daughter was putting up a little bookcase in the hallway to put some what-nots or books on, and Mrs. Houston was out getting ready for lunch.

By that time she went upstairs, Mr. Houston was asleep. She awakened him and asked him if he wished to come down for breakfast. He said he did. She asked him if he would like to have her bring up the tomato juice. He said he would, and she went down and got the tomato juice and put it on the stairway up by the bathroom because by that time Mr. Houston had gone into the bathroom to wash up.

He had come out and he drank the tomato juice and then came down the stairs in his bathrobe and in his slippers, and pajamas and without his glasses.

That as he came down Ann was there putting up that bookshelf, and she was singing, "Oh, What a Beautiful Morning," and Mr. Houston's comment was, "It surely is."

And then Ann said to her father, "We're going to have steak for breakfast." He said, "That is fine," or "Sounds good," or words to that effect, and he walked on down the stairway through the kitchen, down the stairway, and the next time they heard anything was the thud or a shot.

Now, according to Mrs. Houston, from the time she awakened Mr. Houston to the time he was found

in the basement was not over ten minutes. That was important, your Honor, important in my view because the fact that a man awakened out of a sound sleep, in ten minutes go into a bathroom and wash, drink his orange juice, go down, is this consistent with the idea that he was bent on self-destruction? It seems absolutely incredible, impossible.

Now, that is what the actual occurrence was. Mrs. Houston ran down to the basement and she found Mr. Houston there, shot, and she called to Ann to call the ambulance.

Now, Mrs. Houston places the body and Ann Houston placed the body where it is shown here, where, according to the scale, would be about 22 feet from the place where the shot was fired. Officer Pine places the body closer to the ironer over there, and that would be somewhere in the neighborhood of 15 to 18 feet. The fact remains, nevertheless, that Mr. Houston did go into that corner. The evidence is that that is where guns were kept; Mr. Gustafson said he put guns in there; that is where they were kept and all members of the family testified that in that corner guns were consistently kept by Mr. Houston. The testimony is not that he kept all his guns in there, but guns were constantly kept in here (indicating), from time to time, and Mr. Gustafson said he placed three guns in that corner at the close of the sporting season or fishing season in November of 1953 when Mr. Houston came down from the hunting season up there; he was returning his sporting things from the ranch for the winter. He said

he saw those guns in there as late as January 15th, I think—he said somewhere in there, 1954.

All of the witnesses that were familiar with Mr. Houston's habits testified that he kept guns all over, that he kept guns loaded from time to time, that he kept shells all over; that while he was careful with firearms, he said that people with loaded guns were careful, which is just the standard of a man who feels that a gun is a lethal weapon and therefore the best way to keep people away from them is to load them and tell them so.

The evidence is that the area in which those guns were kept was a lower area, which required Mr. Houston to lean over. The evidence is that that corner where those guns were kept was all cluttered up, and the officer—everyone who saw the area, said that the area had bedboards and fishing rods and all miscellaneous things sticking out into an eighteen-inch pathway. Well, eighteen inches, your Honor, is pretty small. I'm nearly that broad across.

There is no question, the only thing undisputed in this case is that Mr. Houston met his death by a gunshot wound, a gunshot which was fired in the location designated in Plaintiff's Exhibit 1 where Officer Pine placed his figure there, as shown, and where the hole—where the board was cut out. The evidence is without dispute in this case, your Honor, that that gun, rifle could be discharged and was discharged by dropping it with the firing pin, the hammer closed, and the firing pin on the shell, which is the position it is laying there now. Both Mr. Kirk and Mr. Bradford testified that they had dropped

the gun and caused it to go off accidentally, without pulling the trigger, they dropped it and had it fire.

Under this state of the evidence, your Honor, and with there being no evidence whatsoever to show self-destruction, there is no evidence, not a scintilla of evidence, to show self-destruction, except that the body was found in the basement and the conjecture as to how Mr. Houston could have gotten over that gun, in the position he did, when it went off. Well, I suppose every one of us, your Honor, has many, many times said, referring to finding someone dead, "We wonder how that thing could have occurred." I can't tell your Honor how Mr. Houston was shot. I say it is unequivocal here that neither has the defendant in this case told us how he was shot. There is speculation, conjecture, innuendo, inference, that he could have leaned over that gun and fired the shot. We do not deny that. It is equally true, and the evidence is equally as strong, that he could have slipped and fallen and hit that gun and in catching it and dragging it to him, he could have been in that position. He was already stooped over. If he had reached and taken the gun this way and swung around with his leg or clothing, the gun could come in touch with anything so as for him to have gone over onto that gun so that it fired in the position it did. It would have been the simplest thing in the world. There is nothing magical, there is nothing unusual, it is not an impossible situation. On the contrary, I think it could be reenacted a dozen and one times.

Mr. Houston was a tall man. He was already over that gun at the time when he was moving it. But there are a dozen other factors which enter into it which would show that he did not. In the first place, Mr. Houston was a sportsman and he knew guns. The evidence was that he had a revolver upstairs in his closet or in his dresser. Why would a man go down to shoot himself in a position which might not be fatal at all and take a chance? With all these other things before your Honor, no motive, no reason, no family trouble, no business trouble, a man with a financial and sound position, a man planning for the future, a man with a daughter to be married, a man respected and loved in his community, a church man—there was nothing about Mr. Houston that even indicated a man who would take his own life. Not one of the people who lived with that man for years said they had even heard him suggest such a thing. Those things, do they not count when the time comes to weigh the scale of justice, more than by simply saying, "We found a man in a certain position and he was shot and therefore we will say he killed himself." By what rules do we live this game of life, that when we come to mete out on the scale of justice we can not call upon our history and our practice, the things that we have done in time gone by, our attitude to our family, our friends and our business? In the things that we do then, that is how we should be judged, not only on the scales of justice, but on every other measurement.

The most flimsy defense I have ever seen in any

case, your Honor, is the defense of suicide in this case, a hasty conclusion drawn without looking into the background of this family, without looking into the reasons which Mr. Houston might have. You couldn't even find a struggle to find that behind his pains and aches there was something in his health, that he might have been told he had cancer or something which would have caused a man to do a thing like this. There was not one shred of evidence. On the contrary, the evidence is that this man was out working, that he was anything but in bad health, he was not in a bad financial condition, he was in an excellent financial condition. Struggle as they might, try as they might, dig as far down as they could, they dragged out one thing: an automobile accident, and they tried to tar this man with the name of a woman of ill repute, and it blew up like a firecracker.

Now, I say, your Honor, how are we entitled, Mrs. Houston, entitled to have this death of Mr. Houston interpreted under fair and just construction of the law? I think it is just the way the cases say, that if by any possibility this man could have come to his death by accident, then these defendants can not sustain their defense. They must show beyond any shadow of a doubt that this could not have been an accident.

Well, your Honor, I'm a little short. I'm only five feet six, and it would be no problem for me at all to lean over and fall on this gun in such a manner as to shoot myself in the angle in which that is. I could slip, I could have a greasy barrel of this

gun and have it dropping out of my hands, and go down and get it, and I could have reached around here, and this, which all the witnesses said was a loose action, and it might, when it pulled out or had been put in an open action, Mr. Houston, being a sportsman, could have seen it open, not having his glasses on, say, "I better not go out in all that clutter with that gun open like that; it exposes the trigger: it may go off," and then in a foolish, idle moment, he may have leaned over to close this, and not having his glasses on, it would have been an easy matter for him to discharge that gun. I could stand here, your Honor, — he could have just dropped that gun like this, and being stooped over already, he could have followed it over in the position he was.

I have known so many cases, your Honor, of accident where I knew they were accidents, which if anyone tried to reconstruct that accident, it would have been utterly impossible because things just don't happen in that way.

The burden is not on us to show that was not suicide. The burden is on them to show it was. And the undisputed evidence in this case, your Honor, is that it could have happened accidentally. The verdict in the coroner's jury is not binding on this Court, but it is evidence that the coroner's jury heard the witnesses in this case that were called before it. They concluded they couldn't determine. I will say to your Honor right now that if I didn't have the background that I have produced here for this Court, a background that I think your Honor

will agree we have put in without any hold-back whatsoever, even to the point of tediousness, we have gone in and produced for cross examination the very inner life, the inner sanctum of Mr. Houston's doings——. Did we find anything on cross examination at all? They were here, and if there was anything, if he was a drunk, if he was a man to commit suicide, why wasn't it brought out from those who would be the most likely to bring it out and say so? They were under oath. Now, there was no cross examination of those witnesses, and well and good reason there wasn't: simply because they were not the type of witnesses that would get on that witness stand and say to your Honor (if it were not the truth), number one, Mr. Houston did not drink to excess; I never saw him intoxicated; and in their opinion he was in good spirits, there was nothing to show any intent or desire to leave this world, and if he had any they would have told your Honor so because they were that kind of people. Two of them were close associates, three of them, and they are members of this bar, officers of this court, and they under their oaths and also under their oaths as officers of this court have told your Honor that they have never heard the slightest suggestion that Mr. Houston—the slightest suggestion of Mr. Houston doing away with himself. Now, I have summed up here very briefly what I deemed to be the high spots of the testimony here and over which the defendant in this case can not get, and that is the whole pattern, the fabric of what has been produced here, one from which only

one conclusion can be drawn, and that is that it was not intentional.

I will enunciate them quickly for the record. Mr. Houston slept late that morning, as was always his custom to do. He took time to put on his bathrobe and his slippers, to go in and wash, to drink tomato juice. Would a man within ten minutes of the time of his death, if he were going down to shoot himself, to go in and bother to wash, bother to put on a bathrobe, bother to put on his slippers, bother to drink tomato juice? I submit he would not.

Could he go down those stairs past his daughter and his wife, where the testimony shows that they would close to him, they were a part and the fabric of him; he lived for them; he was a church man with them; he went to their sorority things; he went to the social things; he was not a man who didn't love his family; but could he have walked down past them within one and one-half minutes of the time of his death and not have shown in his demeanor, have shown in some way that what he intended to do? They both said he showed no differently, he was happy, that she, Ann, was singing, "Oh, What A Beautiful Morning," and he said, "It surely is," and then "We're going to have steak for breakfast," and he says, "It sounds fine." Does that sound like a man going down to kill himself within a minute and a half? I submit that no man is made of such steel and fabric that he could do such a thing. He would give evidence of it in every single act. I say he couldn't do it. He would find some other way. He would have taken a revolver and

gone away from his family. He would not have gone down into that corner and fired a bullet which in going up might have killed one of the members of his family. That alone to me would be a circumstance which would say to me: "A man wouldn't do that, a man who knew guns." He knew that if a bullet of that caliber was fired in that fashion it would go right through him and kill anyone else it hit, and he would expose his family above him.

Every single thing pointed to the fact that Mr. Houston did not contemplate self-destruction. He left his glasses off. If a man were going down expecting to get a gun and load it and to pull the trigger and everything, do you think he would leave his glasses behind, when the testimony is that he always used his glasses and had to have them to see well?

There is another thing that I think is very significant in this, your Honor. Your Honor will remember that Officer Pine was on the stand. He said that he had seen this bag of shells in which, he testified, had some shotgun shells, had some shells in there, rifle caliber. And later when Mr. Bradford and Mr. Kirk testified, he testified there were three different calibers of shells in that bag. I asked Officer Pine when he picked up that bag of shells was it open or closed, and Officer Pine said it was closed. Now, let's assume that a man had gone down there and he took a shell out of that bag and he was going to put it in there to commit suicide, all of which, according to the testimony, undisputed testimony, he never had time to do. Would he have

rolled that bag back up again and closed it after he took a shell out of it? I would say no. He would just take the thing out and lay it down, certainly. And certainly he had to in the time that elapsed in this particular instance.

Now, there is another bit of evidence here, your Honor, and that is the distance from where Mr. Houston was shot to where his body was found. I do not care whether it is where Officer Pine put him or whether it is where Mrs. Houston and Ann put him. The fact of the matter is that Mr. Houston was shot clear over in this corner and did what any man would do who was accidentally wounded, and not what a suicide would do. After being shot, he struggled all the way from here, clear over to where his body was, a distance, if you take this, of about 15 to 18 feet, and if you take where Mrs. Houston and Ann put him, it would be 22 feet, and here he was trying to reach help. If a man were going to commit suicide, do you think for one minute that he would shoot himself and then try to reach help? He would shoot himself and quit right then and there. That would be the normal thing for a man to do in that condition. Mr. Houston at the time he went over there and fell was trying to get out to get help, and that's why he was headed right square for that door. He was almost to it. And I submit, your Honor, that is likewise one of the tell-tale things in this case.

Accordingly, your Honor, in this case I respectfully say that the defendant has failed to produce any substantial evidence for either one of the sepa-

rate defenses. The only evidence that the defendant has produced as to intoxication is that on an occasion, a time, testimony of one of the witnesses there before the signing of that application, had seen him under the influence of liquor. Just what that "under the influence" was, I don't know. I submit an "occasion" would not defeat that policy, even if that had been before. There is no evidence that Mr. Houston drank other than as a social and only occasional drinker.

Now, he did not use alcohol to excess.

As to the evidence of any suicide in here, your Honor, the only possible evidence of any suicide would be remote, speculation, conjecture and innuendo and inference; that because the bullet went through Mr. Houston when he was in a horizontal position and that therefore he could reach the trigger—I can reach it—that therefore he had to have committed suicide. I submit, your Honor, that that is not adequate proof to meet the test of law, it is not adequate proof to overcome the presumptions and it is not adequate proof to entitle the defendants to escape liability on the policy in this case.

ARGUMENT ON BEHALF OF DEFENDANTS

Mr. Clausen: If it please the Court, counsel asked for the right to open and close. As a matter of fact, as I recall, he said he had the right to open and close. I assume from that that he voluntarily assumed for himself the laboring oar because it would be less than fair if I had the full burden

of proving the defenses for counsel to open and close. It is perhaps unimportant in a practical sense because from the physical facts in this case no matter who opens or who closes, the facts remain the same, and it is our position, your Honor, that at least on one of the defenses that the physical facts alone demonstrate beyond any doubt, your Honor, that the shooting here in this case was deliberate.

Now, there are two issues, suicide and misrepresentation. I shall discuss first the suicide feature because in my opinion, your Honor, the physical facts are so decisive on that particular point I think, your Honor, that if we fairly face the facts and the realities of the facts we must come to this conclusion, either the man shot himself, somebody else shot him or something else shot him. But, your Honor, the theory that somebody else shot him or the theory that something else shot him is dispelled by the physical facts.

There is no argument on the physical facts. Either he did shoot himself or he didn't shoot himself, but, your Honor, there are no facts, no real facts in the case, that somebody else shot the man or that something else shot the man.

Now, if he did shoot himself, as we say in this case is the conclusion, your Honor, to be drawn, why then everything that has been proved in this courtroom before your Honor falls into place, the testimony of the police officers, the testimony of the position of the body, the fact that the gun was kept in the corner or the ammunition was kept in the corner, everything falls into place.

But if the opposite theory is taken, that somebody else shot him, like a murder, or something else shot him, well then, your Honor, it flies in the face of what the physical facts are and we are in the realm of speculation, we are in the realm of wandering in the realm of supposition, and I say, your Honor, to assume anything other than the man shot himself defies the laws of probability.

Now, if he did not shoot himself, then it was made to appear that he did shoot himself because of the physical facts. And then I would say to your Honor: By whom or by what? Now, as counsel tried to demonstrate here, he just couldn't demonstrate.

Now, we know that these things happened, your Honor, these are the facts that happened, and these are the undisputed facts. And when I speak of facts, I say, your Honor, let's face the realities of the facts that have been proved. Here's the man. He either sleeps or he stays in bed on this 22nd of February, 1954, last year, until about 1:30 or 2 o'clock. His wife says that she told him she was going to make breakfast. All right, he is up and he comes downstairs at a time when she expects him, your Honor, to sit down and eat breakfast. He comes in, says nothing to her, he is dressed in his bathrobe and dressed in his pajamas, wearing slippers, goes through the kitchen, passes his daughter in the hallway, and significantly, your Honor, says not one word to the wife, says not one word to the daughter about his going downstairs.

Now, I say to your Honor, if he had any reason

at all to go downstairs other than to do away with himself, would he, your Honor, not have stated something to his wife or daughter? In other words, if his purpose in going downstairs was not to shoot himself, then surely he would have said to his wife, some passing comment: "Well, I'll be right back, I'm going downstairs to do this or something else," or he would have said something of the kind to his daughter.

Now, your Honor knows and I know from experience that people who intend to kill themselves, they don't say anything about it to anybody but they go and do the act. Now, here's a man who passes through the kitchen at the time his wife is preparing for him a meal, passes his daughter, and says not one word about his going downstairs. Neither one even knew that he went downstairs, and then, your Honor, within two minutes, according to the testimony, the shot is heard, giving him time to go downstairs and do exactly what he had in mind doing. And your Honor knows and I know too that people who intend to do away with themselves are acting, your Honor, on the impulse to kill themselves. It isn't for me to try and reveal the workings of the mind of the man. It isn't incumbent upon me, your Honor, to prove the motive of the man.

I have my own proof, that is in the record, the proof from the police officers at a time when Mrs. Houston had not had an opportunity to reflect, at a time when the truth was spontaneous, at a time, your Honor, when she had not consulted counsel,

and at a time when the police officers are there and are trying to find out why the man did it. She tells them then honestly that he had been depressed, that he had been nervous and depressed.

Well, what do the physical facts show, your Honor? The physical facts show that the shooting happened in the middle of a passageway, at a place, your Honor, where the floor board was taken up, with the gun, your Honor, resting in this place, "K-1".

I call this to your Honor's attention, as was demonstrated before. Mr. Houston was a tall man, and in order, your Honor, for him to bend over and do what he wanted to do this day, he not only had to bend over parallel, but, your Honor, he bent over so that the gun is here; but to make sure, your Honor, he puts the muzzle up to his heart.

Now, here is a man who is accustomed to handling firearms, who, according to all the testimony, is careful with firearms. But, your Honor, this thing rests and the depression in the wood shows it is the same as the recoil of the other two places, there is no evidence here of any jamming of the gun down or fall of the gun. Rather, it is exactly the opposite. The recoil makes the depression. Your Honor will remember I asked Dr. Kirk. And so the shoulder pad fits there, and here's an experienced hunter, a man careful with guns, and he knows just how to kill himself. And, your Honor, he is a man who goes around and he is accustomed to killing things, and so I say to your Honor if that kind of a man wanted to do away with himself, he would pick a

good sure way. He didn't give his wife a chance to stop him, he didn't talk to his wife in the kitchen and say, "I'm going downstairs to get a gun," for any reason. He didn't talk to his daughter. No. He went down and in a clear passageway, the gun is on the floor, and this is the significant thing, your Honor, the muzzle is put against his chest, and so it comes out here in the back. In other words, he bends over, your Honor, like the doll, demonstrating with the mannikin) so that, your Honor, the gun muzzle points to the heart—points to the heart, and, your Honor, comes out lower in the back than it enters in the front, which, your Honor, shows—shows, if the Court please, that he was not only bending over deliberately and had put the muzzle of the gun to his heart deliberately, but, your Honor, where he rests it on the ground, bends over like this, and his hand is right here to fire that trigger, as I can, your Honor, so easily.

Now, your Honor, those are the only facts. There, the gun is found. The photograph shows the gun is right there in the center of the passageway.

And after that is done, if the Court please, then the police arrive. There is right at that place, your Honor, blood, and there is a trail of blood from there over to the place where his body is lying with his hands underneath him, just like in that case of Long against the Insurance Company, 43 Cal. 2nd, and he is lying there, your Honor, and the police arrive. The wife says to the police, "He had been nervous or depressed lately."

Now, I say to your Honor, those are the known

physical facts, and with those known physical facts, your Honor, there just can't be entry in a court of law into that realm of speculation.

Now, your Honor could say, your Honor could speculate that somebody ran in there, grabbed him and shot him in that fashion. But, your Honor, as Dr. Kirk and the other witnesses showed, if you drew a string, if you drew a string from that spot in the floor up through the man's body, it would go right overhead about perpendicular. Now, you couldn't possibly, your Honor, even taking their most remote theories—if a man is holding a gun in his hand and he stumbles and he falls, it (the gun) couldn't possibly fall in the position in which they said, or if it did fall, there would be the impression, which isn't there. Rather, it is just as Dr. Kirk said, it is an impression of a recoil, and there are two other recoils alongside.

So not only, your Honor, is he bending over, not only is that gun deliberately, deliberately pointing to his heart, but, your Honor, it comes out lower in the *fact*.

And then, your Honor, to clinch the case, we have the powder burns which are at the entry point, and there at the entry point the wound is of course this large ugly wound that was identified by the police officers as showing that these gases from the explosive shell that was in the gun had burnt and seared the wound around the man's heart, showing that the muzzle was either right resting on his breast or within an inch, exactly where the man would have put it if he wanted to do away with himself, and

exactly, your Honor, as could not have been the case under any other theory.

Well, Your Honor, I call these things to Your Honor's attention. Your Honor has sat up there and Your Honor has had the experience sitting on the bench far longer than I have practiced law, and Your Honor knows and I know that when police arrive at a scene and before the idea of insurance is in the air, let me say, and when we, Your Honor, try to arrive at the truth, which is all in the world that I am interested in in this case, the words spoken or uttered at that time are of far more emphasis and weight in a court of law than what may be surmised later on. And then it is that there is no theory of accident put forth, there is no theory of murder put forth; rather, the wife says, "He had been depressed."

Now, what makes a man depressed, what makes one man depressed and what makes another man not depressed is perhaps for the good Lord to say. It isn't for me to stand here and to try to tell Your Honor. I do know, Your Honor, that in circumstantial cases of murder, as, for example, in the Durant case, the Court sometimes speculates. I believe the Court in that case said this:

"The wellsprings of human conduct * * *"

I am addressing myself now to why this man did it. It is not a burden that I shoulder, because I don't have to, Your Honor, but why did he do it? All right. If Your Honor would invite or would like to have my discussion on it, I would call to

the Court's attention what the Supreme Court said here in 1897, and what they said then is just as true in that kind of a case now as it was then.

The Court: It was a criminal case, wasn't it?

Mr. Clausen: Yes, your Honor. All right, I will skip that, Your Honor, now, and I will proceed to a case——

The Court: No, you don't allow me to interfere with it.

Mr. Clausen: It is the philosophy of what makes men do what they do.

"The wellsprings of human conduct are infinite and infinitely obscure. An act may owe its performance to complex and multiple promptings."

Complex and multiple promptings.

"Who knows each cord its various tone,
Each spring its various bias?"

And who knows? We know what he did in this case, and why he did it, I can surmise.

Now, Your Honor, I have a case here which is very a propos, *Burkett* versus the New York Life Insurance Company, 56 Federal 2nd at 105. This case, Your Honor, is with somewhat similar facts. A man is in a store and he is looking at guns and looking at shells. He goes outside the store and the shot is heard, and the physical facts are reconstructed, and then, Your Honor, the court at the conclusion of the plaintiff's case granted a directed verdict, took the case away from the jury, and the Circuit Court affirmed.

Now, I am addressing myself, Your Honor, to motive for the killing in the *Houston* case because

this court had somewhat the same factual situation. A reconstruction of physical facts that just simply pointed to a deliberate shooting, and when you talk of accident or other causes, it is in the realm of the remote, and so the Court here says:

“Evidence so far disclosed circumstances attending the death of the insured that no room was left for a reasonable hypothesis that it was caused by the act of another. The rebuttable presumption against suicide is overcome by evidence showing that the death was self-inflicted, and a finding that the death was accidental cannot properly be made where a fact or circumstance established by uncontroverted evidence is inconsistent with a reasonable hypothesis that it was due to accident. (Citing cases.) The evidence shows nothing inconsistent with the hypothesis that the death was self-caused.”

In other words, just like in our case, there is nothing inconsistent in any scrap of evidence, Your Honor, that the death was self-caused here.

When you come to motive, then, as this Court pointed out, the fact that the insured's:

“* * * situation and surroundings were such as to make it seem to others unlikely that his worries about his physical condition would make him wish to take his own life was not inconsistent with the existence of the suicidal intent; it being a matter of common knowledge that persons who have abundant reasons to be satisfied with their lot in life do commit suicide. (Citing cases.) There was no evidence having any tendency to prove that the gun was fired as a result of the hammer accidentally

coming in contact with another object with sufficient force to produce that result." Exactly as in this case. No evidence, Your Honor. Even, Your Honor, this hypothesis when presented to their own experts, showed, Your Honor, that when they tried to bang it down with the hammer cocked, they couldn't set it off, and even with the hammer down, the only time they set it off was once, and, Your Honor, that was with bullets that weren't the kind that killed Mr. Houston.

Your Honor will recall that I asked the very simple question of Mr. Bradford, what kind of bullets they used, and finally it developed that even in their tests they had to use—they had not used the kind of bullets that killed Mr. Houston, and I asked the witness if he could just answer the simple question, and he had to admit that the kind of bullets they put in to do the tests with were doctored bullets; they had taken the powder out or they had done something else to them.

To go on with this (56 Federal 2nd 105):

"There was no evidence having any tendency to prove that the gun was fired as a result of the hammer accidentally coming into contact with another object with sufficient force to produce that result. That the firing was so caused is a mere possibility supported by nothing shown by evidence."

Exactly as this case.

"The idea that the firing was so caused is not reasonably reconcilable with facts established by the uncontroverted evidence."

Another case, Your Honor, on the same point, is

that California case of Long against California Western States Life Insurance Company in 43 Cal. 2nd. It was decided by our California Supreme Court last year. And there again, Your Honor, the physical facts demonstrated when the deceased fell, he fell with his hands underneath him, and had he fallen accidentally, his hands would have outstretched, and therefore the Court reasoned that as a matter of law—as a matter of law, Your Honor—he killed himself.

Exactly as in this case. There is no evidence that if the man would fall, he would fall with the gun out like that, with the gun surely pointed against his heart, to make sure the bullet comes out lower in the back.

That case of Long against Cal. Western States Life Insurance Company is 43 Cal 2nd.

Now, the path of the bullet is known; where the butt of the gun was resting is known; the vertical path of the bullet through the body is known. And so I say to Your Honor that from all the evidence, when we enter the realm of speculation, the remote area, it is not in accordance with the physical facts. I would ask Your Honor again, here's a man, he's an experienced hunter, who himself had warned other people that they should assume guns are loaded; who, Your Honor, would know better than anyone that unless he wanted deliberately to do away with himself, not to put the muzzle of a gun against his heart or within an inch from his heart, aimed at the heart area, close to the chest. And now, Your Honor, to have them speculate that he

was so careless or so something or other, de hors the record. There is nothing in the record to prove it. Your Honor, it flies in the face of the physical facts.

We know what he did. We know that he did these things. We know that he went past his wife and we know that he went downstairs only to, within two minutes or a minute and a half, to kill himself? No, Your Honor, there is nothing inconsistent in all this evidence that is before Your Honor, the written as well as the physical facts, that is inconsistent with the idea that he killed himself. But there are a great many inconsistencies and a great many conflicts between any such theory as the other side espoused.

Now as to the possible motives, is it as this Court points out in the Burkett case? Perhaps "the well-springs of human conduct" as the Court said in the Durant case? But in any event, who is to say? I don't know. But here is something that shows all was not well. First, you have a man who is in pain. I don't know what the pain was caused by, but the prior week, Mr. Masters testified, the man was in pain. That may have been a part of the pyramid; I don't know. As the wife said at the time, before insurance was in the air, "He was always depressed or nervous around this time of years." What would make him depressed might not make anyone else depressed, but she said that to the officers. That might have been part of the pyramid. I don't think all was well, Your Honor.

This woman in September—rather, in November,

a few months or so before, wrote this letter. I can imagine some people to whom this would be a trigger—a trigger, if the Court please, of remorse. If you weren't afraid of losing of your job, if you weren't afraid of losing your wife, if you weren't afraid of your family, you might have been afraid of yourself. At least this woman who had been paid off for the accident says things in here.

Well, remorse is a powerful motive.

It might have been the mounting pressure of finances. Here is a man that is successively, year after year after year borrowing on his life insurance. As I tell the Court, the pyramid is building up, you can direct the hypothesis, and then you can come down to what this Court says, that it being a matter of common knowledge that persons who have abundant reasons to be dissatisfied with their lot in life do commit suicide.

There is absolutely in this case, Your Honor, no evidence of accident. A mere possibility is not evidence. We know where the deceased stood, the blood is there. That is where the trail of blood originates. Where the gun was found is shown in the photo. There is nothing beneath it except the floor, the floor board that later was taken up; and we know the path of the bullet and we know where it went through the body, with nothing the hammer of the gun could come in contact with except the man's finger intentionally to pull that gun. So the gun would have rested on the floor with the muzzle against the heart area to make the path that we know was made in the body and which we know

went in the ceiling. And so, as I pointed out, Your Honor, all these circumstances, all the evidence in the case, is consistent with the idea of self-destruction and inconsistent with any other motive.

Why else go to the basement, say nothing about your errand? According to the wife, he had no hunting trips coming up, no reason to go down. But go down in a secluded place, if the Court please, of the basement, alongside where a gun was kept, alongside where ammunition was kept, and put it down and pull the trigger. The Court could see from the demonstration, it is ever so easy with the hand extended to do just that very thing.

The man had no reason to go to the basement for any other purpose at that time when he was expected to eat. He was not dressed to do anything else. They can talk about running around in bathrobes, they can talk about lots of things, but there was no reason to go down.

The gun was in the remote part of the basement, he wasn't casually—don't you see the point I am making, your Honor?—he wasn't casually going by some place and picking up a gun. He went to the corner for a purpose, and that purpose was only to get the gun to shoot himself.

And there as the test alongside the declivity there in the center shows, it is the same kind of a mark there in the center as each of the other two from pulling a trigger. And so the gun is found then near ammunition, and there is a wound which shows the muzzle was against the heart area and that the gun was so short that it would require a person of his

height, six feet two inches, to bend over parallel plus in order to pull that trigger and make sure it went through the heart, and we say then, your Honor, for all those reasons and physical facts that in this case just as a matter of law—as a matter of law, your Honor—there should be a finding for the defendant on the issue of suicide.

I have invited your Honor's attention to the Burkett case, I have invited the Court's attention when we were discussing admissibility of evidence to the Long case. I would like to invite the Court's attention to another case, Saecker versus Metropolitan Life Insurance Company, 51 Cal. App. 2nd 479, where again the Court discusses explanations other than suicide but where the findings of suicide will be upheld, and there the assured, who had been ill, had been confined to the hospital. During the night his body was found on the concrete pavement of a light well at a point just below a hospital window. He was then dressed in pajamas and trousers and had on slippers. The window shade was found to be up, the window fully opened, the screen unlocked. There was no damage to the blind, the screen, nor to the window. Findings in favor of the company were affirmed even though there the beneficiary argued that the death could be explained in ways other than suicide, in that he may have become dizzy and slipped and had fallen while attempting to open the window, that he may have leaned out to observe something, lose his balance, and other equally inapplicable explanations.

We say, your Honor, that under all the facts of

the case here, everything is consistent with suicide, everything is inconsistent with any other explanation.

Now, your Honor, some of the things mentioned by counsel on this issue. He mentioned the ten minute interval, and he said ten minutes from the time the man got up to the time he had gone down to shoot himself was not plausible. We say to your Honor quite the contrary: A man makes his mind up, such as our member of the bar here, a man with whom I had been doing business, Mr. Cohen of Steinhart's office, jumps off the Golden Gate Bridge. Well, your Honor, it didn't take him long to do that. A man who has made his mind up to shoot himself doesn't say anything to anybody else, but does it. The impulse is there. The mounting pyramid is built up and the decision has been made in his mind to do away with himself for the reasons he is moved by, and so he does it. Exactly the same here, your Honor. Where I asked what time elapsed between passing in the kitchen, in the hallway, the witness put it at one and a half to two minutes; there again, the man made his mind up and he was doing down to do it.

Now, they said something about the guns being kept loaded. Well, if the guns were kept loaded or whether he had *to the* bag to get ammunition to put in it, it would be all the same. But in any event, he was careful enough a hunter and careful enough a gunsman to tell people to assume so. That was the evidence.

And then, your Honor, the statement was made

that he had to lean over to go into this portion of the basement. Well, your Honor, that portion was five and a half feet high. He had to lean over a great deal more. He had to lean over a great deal more than five and a half feet, your Honor, to come down to that position.

Then, your Honor, the statement was made about Dr. Kirk and Dr. Bradford dropping it to fire. Well, as I recall the testimony, while they tried to do it in various ways, they jammed, they hit on the side, they hit it on the stock, they hit it in various other ways and when the gun was cocked they couldn't fire it, and the only time they could get it to fire at all was once by dropping it, and there is no proof of any dropping on that board in any place, and then it was only with these bullets that they themselves had fixed up which were not the kind of bullets that were used by Mr. Houston when he killed himself.

And, your Honor, there are other cases—I pointed out the Burkett case, the Long case, that if the man had stumbled or fallen, he would have gone out with the gun, the gun would have been held out.

Well, your Honor, about the glasses. He didn't have glasses on at the time, but I asked the daughter if there was anything unusual about that and she said no. Of course, it wouldn't make any difference. He could see the daughter, he could see going through the kitchen, he could see and talk to the daughter.

Now, then, statement was also made that the coroner's jury heard our witnesses. Well, that isn't

correct. I asked Inspector Parker this morning if he had testified before the coroner's jury and he said no.

And then, your Honor, statement was made that the bag of ammunition was closed. Well, I got it from Mrs. Clayton that the bag was just an ordinary paper bag. There is no closing to that, whether it is folded over or not.

Then that statement that was made about the deceased struggling from this point to here. Well, significantly, your Honor, there is no evidence of any outcry, no evidence of any accident in that form. Rather, on the other hand, I would imagine that if a person is shot through the heart that instinctively the reflexes would operate in some form as to bring the body out to where it was found.

Well, your Honor, that's that issue. We say to your Honor that a decisive, as I said before, decisive finding in this case, in my opinion, decisive from the physical facts, is that the man committed suicide.

Now, on the other defense of misrepresentations. I think counsel is in error. He mentioned something about the application and the man's name on there being Utley. The man's name on there, "Utley," is not any Utley who testified in this case. His father testified in this case, his sister testified in this case, and his sister conceded that she was a hostile witness.

In the deposition she went on to say, your Honor, that she had been a close friend—I am speaking about the type of information asked for by the in-

insurance company and the answers given by the insured in respect of his drinking habits.

Now, the witness Pearson and also Wilkerson, they both testified on it, and of course you are not going to have people come in here who are friends of the deceased who have participated—more specially if they participated in lunches, dinners, affairs, organizations—all the affairs—and come in here and testify that this man was intoxicated. The point was, your Honor, that he did do a lot of drinking. Now, he did do a lot of drinking. He drank in the mornings, he drank at noon, and he drank at night, and, your Honor, the testimony came, as I again point out, from hostile witnesses. In fact, the daughter of Mr. Utley who did testify here said she was hostile; she had been a close friend of Mr. Houston, she testified, for ten years, and on page 3 of her deposition she testified she had seen him have a drink in the morning. Here on page 6 of her deposition—this has all been read into the record, your Honor—she testified that she had seen him sit down and drink eight highballs. Here on page 7 the difference between a man's conduct in San Francisco and this area, and when he was up in Oregon, was made clear because she characterized it as a Jekyll-Hyde transformation, and, as she pointed out, he himself told her three different kinds of stories about this accident.

Well, your Honor, I just throw the cloak over that episode, the drinking episode, and sum it up because here on page 9 a hostile witness, hostile to us, says this, after telling about his habits up there

in walking in and so forth with mud on his boots and liking a roaring good time:

“Let me ask you this, Mrs. Wilkerson: Would you say that Mr. Houston when he was up there without his wife would be under the influence of alcohol a great deal of the time?”

The answer is: “Yes.”

Page 9, lines 10 to 13.

Well, your Honor, I just accept the fact as what it is. Now, that is what the witness, a witness who is hostile to us, said. And, your Honor, under the law it gives the right to the insurance company because of the facts. I have invited the Court's attention to the specific answers and questions in the application. I would call or invite the Court's attention, then to the law on the subject, the California Insurance Code, Section 331:

“A representation is false when the facts fail to correspond with the assertion or stipulation. Section 359:

“If a representation is false in a material point, the injured party is entitled to rescind the contract from the time the representation becomes false.”

We have the right to defend, as the policy itself gives us the right here to defend, or, as was set forth in the case of *Maggini v. West Coast Life Insurance Company*, and then, your Honor, in the case of *Telford* against *New York Insurance Company*, 9 Cal. 2d. 103, the Court stated:

“A false representation or concealment of fact, whether intentional or unintentional, which is mate-

rial to the risk, vitiates the policy. The presence of an intention to deceive is not essential.”

And the purpose of this rule is well brought out in these cases, *Robinson v. The Occidental Life Insurance Company*, 131 A.C.A. 711, 716, where the Court said:

“The insurance company is entitled to determine for itself what risks it will accept and therefore to know all the facts pertaining to the applicant’s physical condition. It has a right to select those whom it will insure and to rely on him who will be insured for such information as it desires as a basis for its determination to the end that a wise discrimination may be exercised in selecting risks.”

McEwen v. New York Life Insurance Company, 42 Cal. App. 133:

“If you find from the evidence that the deceased was in the habit of using wines, spirits or malt liquors and that had persisted for some time and that he had on more than one occasion used them to excess, then you find the representations herein are false.”

This rule that an unintentional misrepresentation of a material fact warrants rescission of a life insurance policy is likewise, your Honor, the law of *Mutual Life Insurance Company against Chandler*, 252 Pac. 2559, an Oregon case, of the year 1927, and so, your Honor, to conclude whether on the ground of suicide or on the ground of misrepresentations, in either event or for both reasons, we sincerely submit to your Honor judgment should go for the defendant.

Mr. Angell: The first response I would like to make, Your Honor, is to the question of opening and closing. It is my own understanding—I don't want to take advantage of Mr. Clausen—that the plaintiff has the opening and closing, and, as a matter of fact, the pleadings are in such state that all the facts which we had to prove on an opening of our case were admitted on the pleadings and only the affirmative defenses were in dispute and therefore as Mr. Clausen was ready and willing to go ahead, that did not change the right of counsel to the opening and closing. That is my understanding. If the Court feels I am incorrect in that, I certainly would abide by the determination of the Court. I did not understand——

The Court: What is the importance of that?

Mr. Angell: I don't know.

Now, with respect to this issue of intoxication, I am going to take that first because counsel was reading from cases here, and it is interesting to note that counsel didn't call attention to what the representation in that last case was because that is all the materiality that is just in that. Here Mr. Houston said, "I drink; I use alcoholic beverages, yes." That was his answer affirmatively. He didn't say, "No." That would have been a misrepresentation. He said, "Yes," and according to the way he construed his drinking, it was social, only occasionally.

Now, this has been constantly before the courts of California and every single case has to stand on its own legs and that is as to what was said

and then what the conduct of the person was. But here is a case which is very apt on the facts and on the issues that we have, *Mayfield vs. Fidelity & Casualty Company*, 16 Cal. App. 2d. 611, and at page 627,

“With respect to the feature of waiver, it is proper further to observe that appellant’s contention that no waiver of any provision of the policy could be accomplished by an agent of the insurer, is based on the assumption that the fact of intemperance of the assured was established by the evidence. With this basic assumption, we can not agree. The jury returned a general verdict in favor of respondent. In support of this verdict and the judgment which followed it, a reviewing court is entitled to assume that the jury found that the affirmative defense of misrepresentation had not been established by appellant. As heretofore noted, the misrepresentation relied upon by appellant as sufficient to enable it to avoid its contract related not to a definite, readily definable fact, but to a matter which necessarily called for an expression of opinion. Applicant itself selected the language which formed the inquiry and is therefore responsible for any lack of clarity or ambiguity or difficulty or definition of the phraseology which it elected to employ.”

Now, that is what we have here.

“The meaning of the word ‘temperate’ as used in the application for insurance is largely a matter of opinion, depending upon the liberality of view entertained upon the subject by the individual. In the absence of any standard of measurement,

the question was one of fact to be determined by the jurors, whose conclusion with respect thereto would depend largely upon their opinion as to what the word 'temperate' means. The record is bare of any showing that the insured used intoxicants to the extent that his indulgence therein interfered with the conduct of the business in which he was engaged. There was evidence that he drank to an extent that made him quarrelsome and ugly and inflicted upon respondent a course of great mental anguish. Here again, the factor of an opinion of an individual complicates the problem. Different individuals do not entertain the same opinion with respect to the use of intoxicating liquor. For all that appears, respondent may be so constituted that the consumption by her husband of a very moderate quantity of intoxicating liquor on one occasion as on a number of occasions widely separated in point of time may have caused her keen mental anguish. All of this simply serves to emphasize the fact that the question of whether an individual is temperate or intemperate in the use of alcoholic beverages depends largely on opinion and presents a problem which is eminently proper to be determined by the triers of fact. We think, therefore, that the trial court did not err in denying appellant's motion for a directed verdict."

In other words, Your Honor, it is nothing scientific or nothing accurate in the words 'you use alcohol to excess?' One man says, "No." One man says, "Yes," if he drank the same amount.

I maintain, Your Honor, that the proper ap-

proach to those words is simply this, that is, the testimony was produced here by the plaintiff of all the social people they went to parties with, the people that they attended the insurance company banquets and meetings, conventions, the people who were daily in his office and said they never saw Mr. Houston where he couldn't handle his business or that he was ever incoherent or staggered or didn't know what he was doing; he was always in a condition to drive his car. Even as Mrs. Wilkerson testified in cross examination, that she drank along with him, there may be a case in her testimony, Your Honor, as the man who said to his wife, "I wouldn't drink that other drink if I were you, dear. Your face is getting blurry," because it may be that she defines those things differently than anyone else would. Those are merely opinions, and I think the question of intoxication or misrepresentation in the insurance application here, Your Honor, there is absolutely no evidence, no substantial evidence to which anyone could say Mr. Houston in any way drank so that this insurance company would not have taken the policy had they known exactly how many drinks he took and when. They could have asked those questions if they wanted to, but they didn't. They left it to his opinion for him to tell. They could have looked into it at any time they wanted. They had noticed when they saw the application that he did use, take drinks occasionally, socially. They didn't know how much, but they could have looked into how much.

I submit, Your Honor, it is common experience,

if every insurance company in the land took a position that Canada Life takes before this Court to-day, there would be an awful number of insurance policies that are in effect now with answers just like that that would be canceled after collecting premiums on them for years. I submit, Your Honor, that what is troubling the defendant in this case is not any great moral sense of misrepresentation. It is the fact that Mr. Houston met his death so soon after taking out the policy. There is not even the remotest suggestion that Mr. Houston took it out with the intention to defraud the insurance company by committing suicide. That is one of the things I looked for and that has not been made. However, to determine a motive, realizing the absence of motive in suicide, Your Honor, is probably one of the greatest requirements before a court or jury will sustain a verdict or a judgment of suicide, that there be a motive. In all these cases that were cited, I would be very much interested to have Your Honor look at what motives were. The one case, the Long case, that was cited here to Your Honor several times, the man grabbed a gun or a pistol and had run through a door and said, "You'll never see me again," and the next thing you know the gun went off and he was dead. Now, that would be almost a part of the *res gestae*, Your Honor, a declaration. You would be almost bound to accept as from the man himself that he was going to commit suicide.

I would like to call Your Honor's attention to a couple of cases here that are extremely interest-

ing from the factual side, and that is this Beers vs. California State Life Insurance Company, 87 Cal. App. 440, at 456. In this case, Your Honor, the deceased, a Miss Beers, went to a drugstore and purchased strychnine and she said she wanted it to destroy rats. She seemed very light-hearted and gay and when she walked out there was nothing to indicate any reason for her to buy that outside of the purpose stated, for rats, she said. In other words, one of the witnesses testified that when she went down to purchase this strychnine that she stated she wanted it for rats. The evidence then disclosed during the night that Miss Beers was taken with cramps and pains, she died, and subsequently it was learned she died from the effect of strychnine poisoning. The jury found she had not committed suicide, that it was accidental.

On appeal, the appellate court had this to say:

“It must be borne in mind that the defendant entered the trial charged with the burden of overthrowing the presumption that the deceased was sane and that her death was not suicidal but from a natural cause. It rested upon the defendant to overcome said presumption, or in other words, to support the affirmative defense of suicide ‘by a preponderance of clear and satisfactory evidence, direct or circumstantial.’ (37 Corpus Juris, Section 443, page 640, and cases cited in footnotes and also the above named cases.) And whether the defendant introduced sufficient satisfactory proof to overcome that presumption or to sustain that defense was a question to be solved by the jury, with whose

conclusion we are not privileged, legally, to interfere unless the evidence of suicide is upon its face obviously such as to compel us to hold that no inference but that of intentional self-destruction may reasonably be drawn."

Now, here we have, Your Honor, a young lady going down and buying strychnine. The next thing you know, she is killed by it.

Another case, Your Honor, is the Prudential Insurance Company of America vs. Baciocco, and this is 29 Fed. 2d. 966 and decided by Judge Dietrich with Judges Norcross and Gilbert sitting with him. In this case the deceased was found at the bottom of a cliff out here at the Cliff House. He was 29 years old, had a wife and two children. The court found he was industrious, temperate, but as bearing on motive for suicide, the appellant adduced evidence tending to show that for some time prior to his death he had maintained unduly intimate relations with a woman other than his wife and that he was in a measure responsible for the dissipation of the assets of the business in which he and appellee were engaged. His death occurred on a Saturday night or early Sunday morning. On the preceding Wednesday his "girl friend" with her brother and sister went on a vacation to Ukiah, in an automobile which he had rented and authorized the garage to let them have. He went by train the following day and all four were in and about Ukiah until Saturday when they all came back to San Francisco in the automobile, arriving about 7:00 o'clock in the evening. He and the girl

had dinner together at a restaurant and drove down the Peninsula until 12:30 in the morning when he took her home and left in the automobile. The girl testified he had not been drinking and he did not appear to be uncommonly melancholy. He didn't say where he intended to go and she took it for granted he was going home. And the next thing, they found his body washed up on the beach.

Now, obviously all these things are introduced to show motive, Your Honor, and the court in this case held that there was insufficient evidence to sustain the burden of proving insured committed suicide.

Now, the defendants here realize the importance of motive. All the way through they have tried to drag in such incidents as the automobile accident which was futile, certainly, to the nth degree. Claim is made that that letter—so much is made of it—the letter written by the girl making demands for money. The letter was brought here and read in evidence, read at my insistence, and instead of being a demand, the lady only asked that she might as a courtesy have a loan to get to Los Angeles, and the letter was answered by the secretary which, I take it, was proper to do, and the secretary wrote and suggested that she get in touch with the insurance carrier who had made the settlement and said that if there was anything more they could do, she felt certainly that they would do the right thing by her. There is no evidence that at

any time after that Mr. Houston or anyone else ever heard from this lady again.

Now, then, in the argument—I just want to comment on a few statements made—all the way through in his argument Mr. Clausen referred to the statements of the officer as to what Mrs. Houston said to him that morning or that afternoon, on February 22, when the officers came to the house on Mr. Houston's death. Repeatedly Mr. Clausen said that Mrs. Houston had told the officers that he was depressed and that was not stated once, it was stated several times.

So that there can be no question in the recollection of Your Honor, I wish to see the Exhibit 8 of defendants (sic) and the notes of Officer Pine. His statement was, and he is the only one that testified on them because Mr. Parker testified he didn't interview them when he talked to them this morning.

Pardon me. This is the one I want. But this (exhibit) isn't the one. I guess it is Exhibit J, Defendant's Exhibit J.

Officer Pine's statement was that Mrs. Houston said he had been depressed or worried or something about these reports before but he was in fine spirits lately, and I believe that is the exact language used by Officer Pine.

(Colloquy between counsel and the clerk with reference to exhibits.)

Mr. Angell: I am reading from this report, Defendant's Exhibit G, in which he said:

"Mrs. Houston said at first that he has periods

of depression and was depressed lately. Later, however, she said that over this weekend he had been in fine spirits."

Now, that's the statement by Officer Pine—"over this weekend he had been in fine spirits." That coincides exactly, Your Honor, with the testimony of all the other witnesses.

You don't have to go to Mrs. Houston who was speaking right after she had come upon the body of Mr. Houston and then she is asked about these things. She later said in her testimony when asked about the use of the word "depression," "I didn't mean that; I meant that he was preoccupied or that he was thinking about this report, which he did every year."

And Miss Hoffman explained that. She said that every year Mr. Houston had to get this out, that it was required by the law, and not only the law of New Zealand but the law of every state in which they did business here. The evidence from the office, Mr. Masters, Miss Hoffman and Mr. Houston is that he had been in fine spirits lately; and Ann says in her testimony she saw no evidence of any worry or anything unusual in her father. And equally important is the testimony of some ten to fifteen other witnesses, all produced, who had seen the witness within one, two, three days of what had happened.

Great emphasis has been put on the position which Mr. Houston was standing in at the time. In fact, that is the only evidence in this case—the only evidence, if it be evidence, that that thing could

have been self-inflicted. There is no motive established. You just simply have to say that a person of Mr. Houston's size and in the place he was could not have gone back there and be shot as he was without having it self-inflicted. I submit, Your Honor, that there is absolutely no basis for such a violent assumption. The two men here who could answer that, Mr. Kirk and Mr. Bradford, both testified that they had discharged that gun by dropping it. Your Honor knows in how many different ways an accident can happen, and for us to put ourselves in a position—to get that exactly in the position that it was when it went off, the cases all say that that testimony is not subject to expert opinion; it is nothing on which we can bring anyone here to testify; that we can show what did happen and then it is for the trier of the fact to determine whether that could have been accident or must it be self-inflicted. We submit that with all of the background testimony in this case, and all of it without conflict, and with the testimony being totally and completely void of any motive which could have inspired Mr. Houston to do away with himself, that the one and only one conclusion we can arrive at would be that this was an accidental shooting.

I again call to Your Honor's attention the number of factors that are present in this case which I think you will find present in no other case in such abundance and such profusion, and that is a complete and total lack of any reason to do the thing. Also the manner and the place in which it

was done, the circumstances and environment at the time of its doing.

Mr. Clausen tries to wave off that people commit suicide on an inspiration. He draws the classical example of all the people that jumped off the Golden Gate Bridge. Practically all those that have jumped off that bridge, Your Honor, have driven out there and they had taken a long time to drive and they had had a long time to contemplate before they arrived, and I without knowing anything about the evidence as to each man who jumped over that bridge, how long he contemplated it, whether he told anybody he was going to do it, whether he was under the influence of liquor, whether he was suffering from some psychic difficulty, all those things are absent, so that I can't undertake to explain why people went over there. We must look at this case, not this case here or some other case, but just the facts that are before the Court in this case. Again I say that Mr. Clausen has not been able to produce a single witness, not a one, to give any motive behind Mr. Houston's doing this. He relies lock, stock and barrel upon the fact that a man couldn't get in that position except intentionally, except he did it on purpose.

Well, under the testimony of Mr. Kirk and Mr. Bradford, he very definitely could; he could. Mr. Bradford very easily showed Your Honor how you could bend over there trying to pull this here up, and if you touched the trigger when that thing

was in a cocked position it would have gone off. Now, that would have been accidental.

Now, if that was pulled open and Your Honor will remember, Mr. Bradford placed great emphasis on the fact that this action is loose here and that a pulling out of this gun any place would have flipped this. The minute this is flipped out, that trigger is without any guard. That a careful man, as Mr. Houston was, if he had pulled that out of there and noted that that—or heard that open, like that—obviously before he started out through that crowded place, it would only be an act of common good sense to close that. Now, did he, inadvertently because he didn't have his glasses or because he was careless on this particular occasion or what, but it is easy enough to bend over to close that and trigger that. It is also, as I stated before, easy—that barrel could have been greased, as lots of men do when they put their guns away, grease them, and as it went down—as it did, he went down with it to catch it and the thing went off just from a banging on the floor—and as Mr. Bradford and Dr. Kirk both said it could. So obvious is that argument to Mr. Clausen, and it was equally obvious to the jury in the coroner's verdict because they couldn't determine it, and the evidence is that both Dr. Kirk and Mr. Bradford were before the coroner's jury, that he says that the man would have to be shot by somebody else, shot by somebody else or it had to be suicide. Well, that is not a conclusion which can be drawn from the evidence. We have never contended that he was shot

by anybody else. The police determined that the morning they were up there and they said there was no evidence of any third party, and that is what they were there really to investigate. The evidence only is that Mr. Houston was shot in that particular location, at that particular time, and there is not one single iota, scrap of evidence, to show how that gun was discharged, to show how Mr. Houston got in that position, to show that he intentionally went down there to commit suicide. On the contrary, the compelling and absolutely only evidence is that Mr. Houston did not go down there to commit suicide. He went down there either to get that gun to clean it or to do something with it, and something happened while he was there that threw him onto that gun, discharging it, and that is the only rational conclusion from all the evidence before this Court.

Now, Mr. Clausen says that these are the acts he depended upon to show that there was a suicide: He said nothing to his wife or daughter. Well, of course he didn't say anything to his wife or daughter. He went down there merely awaiting breakfast and he said—his daughter said to him—she was singing, "Oh, What A Beautiful Morning," and he said, "It certainly is." She said, "We are going to have steak for breakfast," and he said, "That's fine." So he did say something to his daughter and he didn't say anything to his wife. Now, if a man were going down there to do away with himself, it is more rational that he would have said something to his family, a goodbye or

something, in some way. He wouldn't just coldly, a man with a warm disposition as shown in this case and the affection that that man had for his family, that he would coldly walk down past them to his eternity and not even so much as say goodbye to them. It just doesn't make sense. Certainly, if he were going to commit suicide, he would have said something to them and he would have said a farewell to them in some way.

Now, Mr. Clausen says he can't delve into the man's mind, an impulse for suicide, and I will go right down the line with him. But yet he wants Your Honor to indulge in that and to come up with a conclusion in this case that Mr. Houston did commit suicide so that the Canada Life can escape their liability on a life insurance policy. The Canada Life entered into that contract, I assume, in good faith. Mr. Houston entered into it in good faith. There is no evidence of any fraud whatsoever in getting that insurance. It was just one insurance man to another. Then the insurance company should bear the loss in those cases where they have not had the good fortune that they be in force and effect as long as they would like to have them in order to come out even on the score. But that is what insurance is for.

Now, I say that before you say a man has committed suicide, which is a stigma to leave behind for any man, and particularly a man of Mr. Houston's standing and environment, home life, his religious life, his business life, to dub that man as a suicide upon the facts that have been produced

here, namely, just that he was leaning over that gun, in that position, at the time that the shell was discharged, I say, His Honor, is drawing heavily on the imagination.

We don't have to guess on it. We have the testimony of these experts that that gun could be, and they did discharge it by simply dropping it. Now, what the different methods are that that could be dropped accidentally, goodness, I wouldn't even indulge in the realm of speculation. I thought of some; Your Honor can think of some, and there would be dozens of others. He might have even slipped and gone up in the air and come down on top of that. Saying that the powder burns showed that that was close to him. It did, Your Honor, but it does not show—that is just the point that I brought out from Mr. Bradford—it shows that that was not against the body at the time it was shot; it was about an inch away. Mr. Bradford testified that if that had been against the body, there would not have been any controversy, there would have been no oxygen to have it explode. If he had leaned over to do away with himself and to be sure he got to his heart, he would have been darned sure that would have been up against him, to make sure of it. And to think, to be so foolish as to argue that one familiar with guns would go down there and commit suicide in that way, to think that he can hit a vital organ in that position. The fact is that he did not. He bled to death. The certificate of death that is in evidence shows that. He didn't hit—. The chance of a man hitting his

heart when leaning over trying to find his heart is very remote. A man who, in his position, first, I say if you are going to draw on speculation, it is only speculation—that he would not use that kind of a weapon at all, that he would use a pistol; second, a man who had a family like that is concerned and if he were considering that, he would have gone some place else to do it; third, he would never have done it down there where he might have killed or seriously wounded one of his own family. He would never have come to the conclusion to do the act within ten minutes of the time he was awakened out of a sound sleep and to go down in there and to do it. The evidence is without dispute, and therefore we don't have to conjecture that he did go around in his pajamas, his bathrobe, and, as Mrs. Houston said, they all did it, the whole family. And that is common in many families. That he went down there when he is called to breakfast to look at his saddles or guns or fishing rods, Mrs. Houston said he did it frequently, that it was just a habit of his. I know, I have the same habit; my wife calls me to dinner and I'm headed out to hoe in the back yard.

So I say that the only evidence at all that they produced here, there was a little mannikin that was brought in here only to illustrate the testimony of a witness who,—all he did—was take the testimony of the coroner's jury and reconstruct the direction of the bullet, and under the cases that isn't even admissible and can be stricken right out of the record. I am sure Your Honor would not de-

cide a case on evidence which is not admissible. The cases are so complete and so many that the position that a deceased was in at the time he was shot or was wounded is not subject to expert testimony, absolutely can not be testified to. The circumstances of the shooting, the measurements, the direction of the bullet through the body, are proper, but certainly the position that the defendant was in—we do not know Mr. Houston was in that position, he could have been in half a dozen other positions and still be bent over like that—is not admissible. He might have gone up in the air with his legs up in the air and fallen on this thing as he came down. There's just any one of a dozen ways that thing could have happened, and yet we are told that we have to accept this.

Well, as I say, under the cases, those are clearly not admissible. They are collected together under Cal. Juris.; they have them under Ballistics:

“Expert testimony on questions of Ballistics is admissible. An expert witness may testify, for example, to his opinion as to the caliber of bullet which caused a wound or as to the resemblance or identify of the fatal bullets with bullets of the accused's gun. He may also testify to the operation of a gun and the difficulties in firing it from certain positions, the course a bullet took in the body of a victim or its place of entrance and exit. * * *

But the position or direction from which a gun was fired, the probable position of the victim when it was fired, whether it was fired accidentally or with criminal intent, or the distance at which the

victim stood from the muzzle of the gun at the time of its discharge are not proper subject matters for expert testimony * * *".

Did I give the citation? That's out of 19 Cal. Jur. 2d, "Evidence," Section 367, page 95, and in the footnotes a large group of cases are related there. And they are without break.

Now, much point was made about these experts here having taken a bullet out of the shell before they fired it. It shows the extent to which defendants have to go to defend this case. They said they didn't have bullets like that which shot Mr. Houston but a different kind of a bullet. Well, I think Your Honor is hunter enough to know that a 30-30 bullet is a 30-30 bullet, and I think Your Honor knows how a 30-30 works; just the same as any other bullet: there is a cap in one end and then some powder and then some shell, and it is the shell that goes out or the bullet, rather, which does the damage. The removal of the lethal part of that shell in no way affects the cap which discharges. The only difference would be that there would be no bullet to go through and do damage. And the testimony was that the shells used by them came out of that very bag which was on the little stand in the corner, and that's where they got the shells they used in the gun. So if there was any need to identify those bullets or shells—(bullets: the shell is the whole thing)—why, I think that the argument these were "doctored"—that was the word—is certainly specious.

Mr. Clausen said that Mrs. Houston was talking

to the officer before "insurance" was in the air, which started the implication that Mrs. Houston changed her testimony—that she changed her statement to the officer that he was depressed. I have read Your Honor what the officer said she said and her testimony that she doesn't believe she used the word "depressed," but she said that she thought he was worried or preoccupied regarding this report. The officer, if Your Honor recalls, was asked if he had taken down this conversation verbatim and he said no, that he just remembered it when he got back to the office when he wrote up what happened there, and he just put that in. He couldn't say those were the exact words she used. Well, she says that if she used them, she didn't mean "depression" in that sense. Your Honor will remember, she clearly stated to Your Honor, in response to a question of Your Honor, that she did not mean "depression" in that sense, "melancholy," but "preoccupied" or—more preoccupied than worried.

Now, Mr. Clausen seems to want to throw the burden of proof of cause of death onto the plaintiff rather than assuming it himself. He says there was nothing inconsistent with the theory of suicide. Well, I think that it is just the other way around, Your Honor. The thing we have got to find is that this thing could not have happened other than by suicide. I think the cases are all clear on that, and I would like to submit a memorandum to opposing counsel and to Your Honor to that effect as to the proof.

Now, then, when it came to motive or the things that were assigned by Mr. Clausen as the motive, pain—well, the only pain that was testified to there was that Mr. Houston had been lifting some kind of equipment, that he strained his back a little bit and had that pain. There was no evidence in any way that it bothered him or that it impeded anything he did. On the contrary, the evidence was just the opposite.

Then “depressed,” Your Honor, “around this time of the year.” There is no such evidence, either by Officer Pine or by Mrs. Houston.

Then he said this woman—he tried to drag her into this thing. Well, he sure did and he said, “Maybe it was remorse.” Well, I see nothing in the evidence—I think Your Honor will agree—that even remotely indicated any or caused remorse or required any explanation.

“Finances, borrowing on the life insurance.” Grabbing at straws. The evidence here is from Exhibit 8 which I hold in my hand, Your Honor, and I ask Your Honor to look at this exhibit; this man had quick assets from this exhibit, somewhere around eighty-five to ninety thousand dollars. Now, it is well known that lots of people who have plenty of money keep borrowing money and they that do are very good business men because they usually have a place for the money to work, where they can make more on it than they have to pay for interest. There is no evidence, except mere conjecture on the part of counsel, that Mr. Houston had any financial worries whatsoever. On the con-

trary, Mr. Utley testified that not only did they not have worries about it, but they were contemplating expending this farming venture to some extent, and he was present when Mr. Houston had called and made arrangements to finance some \$30,000 additional to buy more property. So I think that is out.

Accordingly, Your Honor, we will leave this with Your Honor and request judgment for the plaintiff. I have called to Your Honor's attention some twenty different things which in my opinion show this case to have been not suicide and that there was no misrepresentation. Plaintiff respectfully requests judgment.

The Court: Well, you have cited a number of cases. I will give you five, five and five. Who is going forward?

Mr. Angell: I will be glad to first.

The Court: Is that agreeable to both sides?

Mr. Clausen: If it is the position of the plaintiff, Your Honor, that the burden is on the defendant, I think the defendant should open and close, myself, although, if it is the Court's feeling that counsel should open and close for the clarity of the problem, that's satisfactory with me. Whatever Your Honor feels.

The Court: You will have a full opportunity to meet.

Mr. Clausen: To reply?

The Court: Yes.

Mr. Clausen: It is satisfactory with me that Mr. Angell opens.

The Court: Five, five and five. That will take it to December 5.

I should like to have the reporter give me a transcript of this argument. Is that agreeable to both sides? You will make arrangements with the reporter?

Mr. Angell: Yes.

Mr. Clausen: Yes.

(Submitted, five, five and five.)

[Endorsed]: Filed April 12, 1956.

[Endorsed]: No. 15102. United States Court of Appeals for the Ninth Circuit. The Canada Life Assurance Company, a Corporation, Appellant, vs. Charlotte S. Houston, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: April 12, 1956.

Docketed: April 17, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15102

CHARLOTTE S. HOUSTON,

Plaintiff and Respondent,

vs.

THE CANADA LIFE ASSURANCE COM-
PANY,

Defendant and Appellant.

APPELLANT'S STATEMENT OF POINTS

Appellant above named states that the points on which it intends to rely on the appeal in this action are as follows:

1. The trial court erred in failing to conclude as a matter of law that the insured, William M. Houston, committed suicide, and in finding that his death was accidental.

2. The trial court erred in finding that the written application for life insurance of William M. Houston contained no false and fraudulent representations with respect to William M. Houston's use of alcoholic stimulants.

3. The trial court erred in finding that the use by said William M. Houston of alcohol was neither excessive nor unusual.

4. The trial court erred in finding that the answers of said William M. Houston in said application did not constitute a material representation or any misrepresentation with respect to the insured's use of alcoholic stimulants.

5. The trial court erred in finding that the statements in said application were true and were not known by said William M. Houston to be untrue and false.

6. The trial court erred in excluding testimony by defendant's Assistant Secretary that defendant relied upon the answers of the insured in the application.

7. The trial court erred in striking from evidence the report of J. W. Van Doren, insurance agent, dated October 22, 1953.

8. The trial court erred in excluding from evidence the expert opinion of Dr. A. E. Bennett.

9. The trial court erred in excluding the testimony of Mr. James H. Wainwright, Assistant Secretary and Claims Agent of defendant, to the effect that if the company had had knowledge of the drinking habits of Mr. Houston the company would not have issued its policy of insurance.

10. The trial court erred in excluding testimony of the company practice at the time the policy was issued on unfavorable drinking habits.

11. The trial court erred in admitting into evidence the certificate of death of William M. Houston certified on March 29, 1954.

12. The trial court erred in admitting into evidence the verdict of the coroner's jury of March 29, 1954.

13. The trial court erred in admitting into evidence plaintiff's Exhibit 7.

14. The trial court erred in denying defendant's motion to strike the testimony of Dr. Paul

L. Kirk and Lowell Bradford as to firing experiments in the firing tests of the gun, Exhibit B, other than by pulling the trigger.

15. The trial court erred in excluding from evidence the conclusions as to the method of death by Officers Pine and Parker.

16. The trial court erred in excluding evidence as to the conclusion of the coroner as to the method of death and his testimony respecting the submission of the question to a coroner's jury.

17. The trial court erred in other rules of evidence.

18. The trial court erred in finding that interest was due on the principal sum of \$28,552.00 from May 4, 1954.

Dated: May 4, 1956.

HENRY C. CLAUSEN,
HENRY C. CLAUSEN, JR.,
FRANCIS V. KEESLING, JR.,

/s/ By HENRY C. CLAUSEN, JR.

Attorneys for Defendant and
Appellant

[Endorsed]: Filed May 5, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPLICATION FOR ORDER PERMITTING
REFERENCE TO RECORD WITHOUT
PRINTING

Appellee, Charlotte S. Houston, hereby applies to the Court for an order permitting reference to the record on appeal without printing and respectfully shows:

Appellant has designated the entire record for printing except only the life insurance policy, which is the basis of suit herein, of which Appellant has designated but two clauses, to-wit, the suicide clause and the commutation clause.

While Appellee does not desire to burden unduly the record in this appeal with the printing of all of the detailed provisions of said policy of life insurance, other provisions than those designated by appellant may possibly become pertinent in the consideration and determination of the issues raised by appellant in the within appeal.

Appellee accordingly respectfully requests the order of this Court permitting counsel for either party to refer to and print in their respective briefs such additional provisions of the policy of life insurance, which is the subject of suit herein, as may be pertinent to the determination of the issues raised on appeal.

Dated: May 29, 1956.

Respectfully submitted,

PHILIP H. ANGELL,
ROBERT M. ADAMS, JR.,

/s/ By ROBERT M. ADAMS, JR.,
Attorneys for Appellee, Charlotte S.
Houston

Counsel for the Appellant hereby stipulate and agree that there is no objection on the part of Appellant to the granting of the foregoing request for order permitting reference to portions of the record without printing, as hereinabove requested.

Dated: May 31, 1956.

HENRY C. CLAUSEN,
HENRY C. CLAUSEN, JR.,
FRANCIS V. KEESLING, JR.,

/s/ By HENRY C. CLAUSEN, JR.,
Attorneys for Appellant, The Canada Life Assurance Company

[Endorsed]: Filed June 2, 1956. Paul P. O'Brien,
Clerk.